S. Hrg. 100-592

VOIR DIRE

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 953

A BILL TO AMEND THE FEDERAL RULES OF CIVIL PROCEDURE WITH RESPECT TO THE EXAMINATION OF PROSPECTIVE JURORS

AND

S. 954

A BILL TO AMEND THE FEDERAL RULES OF CRIMINAL PROCEDURE WITH RESPECT TO THE EXAMINATION OF PROSPECTIVE JURORS

JULY 16, 1987

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VOIR DIRE

THURSDAY, JULY 16, 1987

U.S. Senate,
Subcommittee on Courts and Administrative Practice,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 8:02 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Staff present: Mamie Miller, counsel to Senator Heflin; Sam Gerdano, counsel to Senator Grassley; Lynwood Evans, legal fellow, Senator DeConcini; and Cindi Blackburn, counsel to Senator Thurmond.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator **Heflin**. The hearing of the Subcommittee on Courts and Administrative Practice will come to order.

I appreciate everybody meeting at this early hour. I am on the Iran-Contra Investigation Committee and I have to be over there at 9, so I would appreciate it if everybody summarized their prepared statements. The prepared statements, of course, will be put into the record and it will be a complete record in that manner.

I have a prepared statement. I will not read it; I will submit it for the record.

[The prepared statement of Senator Heflin and copies of S. 953 and S. 954 follow:]

Opening Statement of Senator Howell Heflin

I would like to welcome all of you to the subcommittee hearing on voir dire. This is the third such hearing we have had on this matter, but I believe that the cornerstone of the American judicial system is a fair and impartial jury, and that the procedure for selecting such a jury is critical. I realize that 8 a.m. is somewhat early to be discussing such an important issue, but I do appreciate all of your efforts to accommodate my schedule.

We are here today to discuss S. 953 and S. 954 which would amend rule 47(a) of the Federal Rules of Civil Procedure and rule 24(a) of the Federal Rules of Criminal Procedure. Under these existing rules, the court has complete discretion as to whether it will permit counsel to participate in the examination of prospective jurors. In the oft-quoted study conducted by the Federal Judicial Center in 1977, researchers found that 75 percent of all Federal judges excluded oral participation by counsel during voir dire.

My legislation would amend these rules by requiring the court to permit counsel to participate in voir dire, if they so request. Each side in the litigation is guaranteed a minimum participation time of 30 minutes, and a maximum of 1 additional hour in multidefendant cases. This provision does not require counsel to use the full amount of their allotted time, and any extension of time for counsel examination lies solely within the court's discretion. This, combined with a finding by the 1977 Federal Judicial Center Study that voir dire participation was on the average only 1 minute longer with lawyer participation in criminal cases, and 8 minutes longer in civil cases, does not appear to constitute a heavy time burden on the courts.

As a former chief justice of the Alabama Supreme Court, I am familiar with the concerns raised by my colleagues in the judicial branch. In a recent Supreme Court case, the Court stated that "the process of voir dire is to ensure a fair and impartial jury, not a favorable one. Judges, not advocates must control that process to make sure that privileges are not so abused." I agree with the Court and I would hazard to say that everyone in this room agrees with this statement. We only disagree over what constitutes judicial control. Although my proposed legislation gives counsel a more prominent role than they have previously experienced, they by no means will control the process. The judge will. He or she will still define the scope of the examination and control the content of the questions, just as he or she controls the content of opening and closing statements and the phrasing of questions to witnesses during the actual trial. Judges will not be rendered helpless by unlimited voir dire. In the event of embarrassing questions, adversarial overtones, or otherwise improper proceedings, the judge retains the unfettered discretion he or she has always enjoyed in the courtroom. The firm hand of the judge will continue to guide the course of justice. The impartial, unbiased role of judges can only be enhanced by this legislation.

Before starting with our first witness, I would like to say that I am pleased to have such distinguished and accomplished individuals testifying before me. I understand that the Association of Trial Lawyers of America wanted to testify in support of the proposed legislation, but were unable to do so because the hearing posed a conflict with their annual meeting which is being held in San Francisco this year. Therefore, the record will remain open so that we can incorporate their testimony into the record.

II

100TH CONGRESS
1ST SESSION

S. 953

To amend the Federal Rules of Civil Procedure with respect to the examination of prospective jurors.

IN THE SENATE OF THE UNITED STATES

APRIL 8 (legislative day, MARCH 30), 1987

Mr. HEFLIN (for himself, Mr. BUMPERS, and Mr. PRYOR) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Federal Rules of Civil Procedure with respect to the examination of prospective jurors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Rule 47(a) of the Federal Rules of Civil Procedure is amended to read as follows:

"(a) EXAMINATION OF JURORS.—Upon the request of the plaintiff or defendant, the court shall permit such plaintiff and defendant or their attorneys each a minimum of 30 minutes to conduct an oral examination of the prospective jury. Additional time for examination by the attorneys may be provided at the court's discretion and the court may, in addition to such examination, conduct its own examination. The court shall have the authority to impose reasonable limitations with respect to the questions allowed during such voir dire examination. In a case in which there are multiple parties, each side shall have an additional 10 minutes for each additional party, except that the total time required to be allowed shall not exceed one hour per side.".

II

100th CONGRESS
1st Session

S. 954

To amend the Federal Rules of Criminal Procedure with respect to the examination of prospective jurors.

IN THE SENATE OF THE UNITED STATES

April 8 (legislative day, March 30), 1987

Mr. Heflin (for himself, Mr. Bumpers, and Mr. Pryor) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Federal Rules of Criminal Procedure with respect to the examination of prospective jurors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Rule 24(a) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(a) Examination.—Upon the request of the defendant or the Government, the court shall permit the defendant or his attorney and the attorney for the Government each a minimum of 30 minutes to conduct an oral examination of the prospective jury. Additional time for examination by the attorneys may be provided at the court's discretion, and the court may, in addition to such examination, conduct its own examination. The court shall have the authority to impose reasonable limitations with respect to the questions allowed during such voir dire examination. In a case in which there are multiple defendants, each side shall have an additional 10 minutes for each additional defendant, except that the total time required to be allowed shall not exceed one hour per side.".

Senator **Heflin**. Any of the other Senators who desire can have their opening statements put into the record.

The first witness is Mr. Joe D. Whitley, Deputy Assistant Attorney General of the Department of Justice's Criminal Division.

Mr. Whitley.

STATEMENT OF JOE D. WHITLEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. **Whitley**. Yes, sir; thank you. Mr. Chairman, thank you for this opportunity to express the views of the Department of Justice with respect to the bills that would amend the Federal Rules of Criminal and Civil Procedure dealing with the examination of prospective jurors in cases in the Federal court system.

I would like to hit a few high points from my prepared testimony, and I will focus primarily on the proposed amendments to rule 24(a) of the Federal Rules of Criminal Procedure, but my comments would be equally applicable to the adjustments to Federal Rules of Civil Procedure.

We support the existing rules which permit the direct participation by counsel in voir dire examination of the jury at the discretion of the trial judge. As was noted by a judge before this subcommittee in other testimony on this proposal in prior years, mandatory attorney-conducted voir dire is a solution, we believe, in search of a problem. The ABA and other criminal defense groups have failed to make their case and, in other words, we would suggest if it is not broken, do not fix it.

The Federal rules are not monolithic in their application to voir dire. Current rules permit judges to use their discretion in permitting counsel to orally examine potential jurors. A loss of that ability, in our opinion, would be disastrous to the courts.

The beauty of our system of Federal justice is in the discretion we grant judges to make decisions in the courtroom or in the course of a trial that a legislative body cannot easily make for them.

We should examine those who are Federal judges. As you know, they are men and women who have been selected by the President and confirmed by the Senate. These are people who have been chosen for, among other things, their impartiality, that ability to provide each litigant, defendant or prosecution with a fair forum and impartial jury.

Yet, is there something wrong with the judges or our selection process? I would submit not, but I would submit that they, not us, know best when to permit lawyer-conducted voir dire.

In the past, my most able colleague at the Department of Justice, Associate Attorney General Stephen Trott, testified against similar legislation in 1981 and again in 1984. He cited the horrific problems encountered in State jurisdictions such as New York and California that mandate participation by counsel in voir dire.

Some of those problems were manifested so as to cause discomfort and embarrassment to potential jurors, as lawyers trained at seminars on the subject sought to "educate" jurors, mold jurors' minds or establish rapport with jurors during voir dire.

The experience in California, New York, and other State jurisdictions reflects that the search for impartiality by counsel in too many cases is nothing more than a thinly veiled attempt at achieving strictly adversarial objectives. But of the many reasons cited by Mr. Trott and in the testimony of some district court judges in their prepared testimony to this subcommittee today, that I find of greatest persuasiveness, is the argument that mandatory voir dire invites a problem where one is not needed.

In a judiciary that, as you know, is overworked, overburdened, and, despite recent attention by Congress, underpaid, recent statistics show that the combined civil and criminal caseload for Federal judges rose by 133 percent since 1970, but the number of judges rose only 43 percent.

To enact mandatory voir dire without a corresponding increase in the number of judges and other court personnel is to invite further backlogs in our system of justice. Therefore, in summing up my remarks, at a time when many of the Nation's courts at the State and local level appear to be moving away from mandated voir dire for counsel for some of the reasons I have cited, this is not the time to pass legislation that is, with a few exceptions, not wanted or needed by those impartial jurists that this Senate has confirmed as capable to preside in our Federal courts.

Thank you, Senator.

Senator HEFLIN. Thank you, sir. We may submit written questions and we would appreciate a fairly rapid response.

[Submissions of Mr. Whitley follow:]

STATEMENT

OF

JOE D. WHITLEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Mr. Chairman and members of the Subcommittee, I am pleased to be here today to express the views of the Department of Justice with respect to parallel bills, S.953, and S. 954, which would amend the Federal Rules of Criminal (S.954) and Civil (S. 953) Procedure dealing with the examination of prospective jurors in civil and criminal cases in the federal court system. The Department of Justice opposes enactment of these bills. Our reasons have been communicated to the Subcommittee in prior comments on these and predecessor measures, in 1981 and 1984, respectively, but I am glad to have the opportunity to reiterate and elaborate upon our position in person in light of the potentially dramatic -- and in our view unwarranted -- change in federal practice that these bills could bring about. My remarks will focus on the effect of the proposed change in criminal cases, but are equally applicable to the proposal for a change in the civil rules as well.

Currently, Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court may conduct the examination of prospective jurors (the "voir dire"), or may permit the government attorney and the defense counsel to do so. If the court conducts the voir dire, the government and the defense attorneys may perform such supplemental examination as the court deems proper, or submit additional questions to the court for the court to consider asking the jurors. Thus, at present, the extent of the government's and the defense's participation in the voir dire is controlled by the court in the exercise of its discretion. A similar civil rule (Rule 47(a), Federal Rules of Civil Procedure) governs the conduct of the voir dire in civil cases.

S.954 would amend Rule 24(a), F.R.Crim.P., to require the court to permit the defendant or his attorney, and the attorney for the government, to conduct the voir dire. The court could then conduct additional examination. The court would be authorized to impose such reasonable limitations as it deemed proper on the examinations by the defense and the government, except that each side would be entitled to not less than thirty minutes for the voir dire. In cases involving multiple defendants, the attorneys for the defendants would be allowed an additional ten minutes for each additional party, except that the total minimum time allowed each side could not exceed one hour.

At present, although the Rules permit federal judges to allow counsel for the parties to conduct voir dire examinations, the vast majority of federal judges have for years preferred to conduct the voir dire themselves. We believe that this prevailing practice has proven to be fair and economical. Moreover, based on the problems of certain States which operate under a rule (like that proposed in S. 953 and S. 954) placing counsel in charge of conducting voir dire examinations, the Department of Justice is seriously concerned that adoption of this approach within the federal justice system would be a grave and costly mistake.

Central to our position with regard to the pending bills is our belief that the present system works well and provides wholly adequate assurances against juror bias. Such assurances are especially important in criminal cases. The federal courts, however, have long interpreted Rule 24(a) so as to recognize the right of a federal criminal defendant to an impartial jury. The Supreme Court has noted that the trial judge's exercise of its traditionally broad discretion over the voir dire, and the restriction of examination by or at the request of counsel, are subject to "the essential demands of fairness," 1/ and has further held that trial judges must conduct or permit sufficient examination to provide a reasonable opportunity for counsel to exercise peremptory challenges in a meaningful way. 2/ The courts of appeals have also held that the voir dire must be conducted in such a way as to afford a "reasonable assurance that [a prospective juror's] prejudice would be discovered if present." 3/

Thus in our view the current system provides the essential guarantees of fairness. Moreover, while we are aware of the claims of proponents of an attorney-controlled voir dire process that attorneys are more suited to discover bias than judges, because of their familiarity with the case and because as adversaries they are likely to probe more deeply than judges, we are unaware of any serious allegation or evidence that the prevailing federal practice fails adequately to elicit bias or denies the parties the right to an impartial jury.

On the other hand, attorney-conducted voir dire suffers from many actual and potential pitfalls. Attorneys may and do abuse voir dire in a variety of ways, for example by using it to question jurors beyond the proper limits of privacy, 4/ to engage in personality contests with opposing counsel, or to subtly influence jurors. 5/ In addition, and of primary concern at a time when swollen dockets and court delays are a major problem in virtually every jurisdiction, including the federal sphere, it

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1/ Aldridge v. United States, 283 U.S. 308, 310 (1931).

2/ Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion).

3/ United States v. Magana-Arevalo, 639 F.2d 226, 229 (5th Cir. 1981).

4/ See United States v. Barnes, 604 F.2d 121, 143 (2d Cir. 1979).

5/ A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit, 60 N.Y.U.L. Rev. 423, 431 (1985).

seems clear that the federal method of conducting voir dire yields substantial savings in time when compared with a system in which counsel control the process. As pointed out previously in our testimony in 1981 and 1984, this has been the conclusion of many empirical studies and commentators, 6/ and recent experience in two States, New York and California, amply attests to this proposition. Indeed, we see in the experience in these jurisdictions the realization of the fear we share that a counsel-controlled process of voir dire examination may well run rampant.

A November 1982 study of the New York State Executive Advisory Commission on the Administration of Justice found that jury selection in New York City's over-clogged courts, under a rule entitling lawyers, rather that the judge, to control the voir dire process, consumed up to a third of total trial time in New York City. The Commission concluded that switching to the present federal rule "could create trial time savings equivalent to the work product of 26 additional judges," noting that its survey found that the average time spent in jury selection under the federal rule was approximately one-fifth that consumed under the present New York State rule. 7/

Because of this and similar experiences in other jurisdictions, there has been a recent trend away from attorney-conducted and toward judge-conducted voir dire. Whereas traditionally the questioning of jurors during voir dire was left to attorneys, as of 1980 only nineteen States allowed attorneys to exercise primary control over the voir dire in civil and criminal cases. 8/ The

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6/ E.g., Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study, 44 S. Cal, L. Rev. 916 (1971); A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit, 60 N.Y.U.L. Rev. 423, 429 (1985).

7/ Recommendations to Governor Hugh L. Carey Regarding Proposals for Jury Selection Reform 1-7 (1982).

8/ Suggs & Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L. J. 245, 250-251 (1981).

same trend is evident in the federal system. Whereas in 1970 a report revealed that under the discretionary provisions of the Federal Rules only 56% of the federal judges indicated that they conducted the voir dire without participation by counsel, a 1977 Federal Judicial Center study (the most recent available according to our information) showed that "approximately three-fourths of federal judges conduct voir dire without oral participation by counsel." 9/

Thus the bills before the Subcommittee would point the federal system in a direction opposite from that in which, on the basis of recent experience, most jurisdictions are moving.

The experience in California with counsel-controlled voir dire examination is even more illuminating. A Los Angeles Times article of February 14, 1984, reported that it took nine months and 129 court days to select a jury in a murder prosecution. Another murder case in 1981 involving the ambush of a sheriff's deputy consumed 82 court days for the voir dire.

In January 1984 the United States Supreme Court decided a case involving a murder prosecution arising from the California State system in which, although unrelated to the question presented for decision, the Court noted, with apparent amazement, that the voir dire "consumed six weeks" (emphasis in original). 10/ This prompted the Court to observe in a later footnote that "a voir dire process of such length, in and of itself undermines public confidence in the courts and the legal profession." 11/ The Court went on to state in the same footnote:

> The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure that privileges are not so abused.***

9/ Ibid. See also G. Bermant, Conduct of the Voir Dire Examination 6 (Fed. Jud. Center Pub. 1977).

10/ Press-Enterpirse Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984).

11/ Id. at 510 n.9.

We concur with the Supreme Court's pronouncement stressing the importance to the administration of justice of a court-controlled voir dire system. While we recognize that S. 953 and S. 954 allow the court to impose reasonable limitations with respect to the examination of prospective jurors, the same is true as a matter of law under those States like New York and California presently operating under comparable rules. The experience in many of those States is that judges often decline to exercise their powers to restrain the conduct of the voir dire by counsel within reasonable bounds for fear of committing error that may lead to reversal, or for other reasons. We are apprehensive that a similar phenomenon, leading to abuses and unrestrained exploitation of the jury selection process, would occur in the federal court system if legislation like S. 953 and S. 954 were enacted.

Any such importation of the California or New York experience with counsel-controlled voir dire into the federal system would be disastrous. We are informed by the Administrative Office of United States Courts that for the year ending December 31, 1986, a total of 337,339 jurors were present in federal court for selection or orientation, and a total of 10,826 juries were selected. 12/

The already strained federal judicial system clearly cannot cope with massive delays in the selection process such as might well be occasioned by a change in practice to a counsel-controlled examination of prospective jurors. Even if these dangers were thought to exist only with respect to so-called "big" cases, it should be remembered that the federal system, at least in litigation involving the United States as a party, probably includes a far higher percentage of major cases than are filed in most State jurisdictions. While we cannot

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12/ Actual jury trials in the same period numbered 9,326, of which 5,365 were in civil cases and 3,961 were in criminal cases.

predict that enactment of bills such as S. 953 and S. 954 would inevitably produce the worst sort of consequences, we do not believe either that their enactment holds the promise of substantial improvement in the voir dire system sufficient to assume that formidable risk.

Moreover, we note that the pending bills fail to include appropriate, related changes to Rule 24(b), F.R.Crim.P., dealing with peremptory challenges. For some unknown reason, that Rule, while permitting each side an equal number of peremptory challenges in misdemeanor and capital cases, allows the defendant in a non-capital felony case 10 peremptory challenges while permitting the government only 6. The Supreme Court in 1976 promulgated a proposed amendment to Rule 24(b) that would have equalized and reduced the number of peremptory challenges in federal criminal trials. Under the Court's proposal, each side in a felony case would have been authorized 5 such strikes. Although the Department of Justice supported this proposal, and although the concept of equality in peremptory challenges is consistent with American Bar Association policy, the Congress rejected the proposed amendment because of the strenuous opposition of the criminal defense bar. The principal argument advanced by the defense bar in hearings at that time was that no reduction in the number of peremptory challenges available to defendants was tolerable so long as the present federal system of placing control of the voir dire in the hands of the judges rather than the attorneys was followed. Since the pending bills propose to alter the current system in the manner favored by the defense bar, however, then if, despite our advice and opposition, the Subcommittee determines to press ahead with S. 953 and S. 954 and give the parties primary control of the voir dire process, the Subcommittee should also amend Rule 24(b) to redress the current imbalance in the number of peremptory challenges permitted in felony cases. We point out further that a reduction in the number of peremptory challenges is desirable because it might offset, to some extent, the anticipated increase in the length of the jury selection process that otherwise would be occasioned by S. 954, and a reduction would also alleviate the opportunity for litigation based upon claims of improper exercise of peremptory challenges, in the wake of the Supreme Court's recent decision in Batson v. Kentucky, ___ U.S. ___ (decided April 30, 1986). In short, we urge that, if the Subcommittee determines (in our view unwisely) to change the process of conducting voir dire in criminal cases in the federal courts, it should also act to equalize and reduce the permissible number of peremptory challenges, as previously recommended by the Supreme Court.

In conclusion, the Department of Justice is cognizant of the concerns of some segments of the defense bar regarding the importance of voir dire and of their belief that permitting counsel to conduct examination of prospective jurors would result in a more thorough examination and could help to assure maximum guarantees against juror bias. However, for the reasons indicated and based on the experience of States which follow such practice, we have concluded that changing the current federal rules so as to mandate a counsel-controlled voir dire process would be counterproductive. Such a change would undoubtedly make trials longer, greatly increase the cost to the taxpayer in civil and criminal cases in which the government is a party (particularly criminal cases in which defense counsel is appointed), and further burden the judicial system. These costs and effects would be incurred despite the fact that the present system works well and includes adequate assurances against juror bias. Accordingly, we oppose the enactment of S. 953 and S. 954.

Mr. Chairman, that completes my prepared statement and I would be happy to try to answer any of the Subcommittee's questions.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 3, 1987

Honorable Howell Heflin, Chairman
Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to follow-up questions concerning the jury selection process sent to Deputy Assistant Attorney General Joe D. Whitley after his testimony before the Subcommittee on S. 953 and S. 954 at the July 16, 1987 hearing.

Your first question was: "In your testimony, you referred several times to a 'counsel-controlled' process when discussing my proposed bills. Could you please explain what you mean by this as I don't consider my bills to establish a 'counsel-controlled' process? In my legislation, the judge would remain in control of the process."

Under Rule 24(a) of the Federal Rules of Criminal Procedure the court may conduct the voir dire examination of the prospective jurors or may permit the defense counsel and attorney for the government to do so. If, as is the usual case, the judge conducts the voir dire examination, he or she may allow the prosecutor and defense counsel to conduct additional questioning or to submit written questions for the court to consider asking the prospective jurors. In short, the court has so much discretion over the voir dire process that it is properly referred to as "court-controlled." In essence, S. 954 would reverse the process and require the court to allow the prosecutor and defense counsel to conduct the voir dire. The judge could then ask additional questions if he or she wished and the bill imposes certain time limits on the counsels' asking questions. Nevertheless, the fact that the bill would remove the court's discretion and allow the counsels to ask questions in any case where they chose to do so would alter the present process to such an extent that it would be "counsel-controlled" rather than "court-controlled."

Your second question was: "[Y]ou stated that the legislatures in both California and New York have considered changing their state rules to bring them in line with the present federal rules. Do you know whether such a change has been adopted? If nothing has happened, do any of you know why such a change has not been adopted?"

The present California statute, Section 1078 of The California Penal Code, provides that the court "shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel." This provision has been unchanged since 1974 when the phrase "such examination to be conducted orally and directly by counsel" was added. We have no information as to why a procedure similar to that in the federal system has not been enacted.

The New York statute is §270.15 of The Criminal Procedure Law, McKinney's Consolidated Laws of New York. That law does permit questioning of prospective jurors by both counsel for the people and for the defendant, but in 1985 the section was amended to provide that the "court shall initiate the examination of prospective jurors by identifying the parties and their respective counsel and briefly outlining the nature of the case to all the prospective jurors. The court shall then put to the members of the panel who have been sworn pursuant to this subdivision and to any prospective jurors subsequently sworn, questions affecting their qualifications to serve as jurors in the action." According to a commentary following this section, the 1985 amendment was one of a series of amendments designed "to codify certain time saving procedures already in use in most courtrooms throughout the state. Commentary by Peter Preiser, foll. §270.15, Criminal Procedure Law, McKinney's Consolidated Laws of New York, 1987 Cumulative Pocket Part.

Your third question was: "[A]ccording to the New York study mentioned in your prepared testimony, New York could create trial time savings equivalent to the work product of 26 judges if the amount of time spent in jury selection was reduced from 12.7 hours to 2.5 hours. According to my own rough calculations, using the same assumptions as were used in the New York study, New York could save a total of 23.5 judges if the amount of time spent in jury selection was reduced from 12.7 to 3.5. Does an additional 2.5 judges, the difference between what would be saved using the federal system versus what would be saved using my proposal, warrant the virtual exclusion of counsel from the process?

We would categorize as inaccurate the assessment that counsel are "virtually excluded" from the jury selection process in the federal system. As you know, federal judges may, when they deem it appropriate, allow counsel to ask questions and may, at their discretion, ask written questions submitted to them by counsel. Moreover, the question assumes that if the New York State court jury selection system involved in the 1982 study were amended by substituting the present federal system on the one hand and the provisions of S. 954 on the other, either amendment would save a considerable number of "judge years," but substituting the federal system provisions would save only slightly more "judge years" than would the provisions of S. 954. While that may be true, the key point is that the provisions of S. 954 would require an increase of judicial resources over those required by the present federal system. While it is difficult to say just how many new "judge years" would be required -- which in the real world means the actual appointment of new federal judges with the attendant salary and other costs which are not inconsequential -- any such new "judge years" are unjustified without a showing that the present system is somehow not fair. In our view, such a showing has not been made.

Your fourth question was: "[I]n your prepared statement, you said that the vast majority of federal judges have for years preferred to conduct the voir dire themselves. According to your testimony, the percentage of federal judges preferring to conduct the voir dire themselves rose from 50% to 75% during the 1970's. To what do you attribute this dramatic and fairly recent change? What effect has this change had on the selection of fair and impartial juries?"

While it is impossible to cite any one factor, in the main the increase in court-conducted voir dire can probably be traced to the ever-increasing work load in the federal system. Cases are both more numerous and very often more complex than they were a generation ago. In all likelihood, many judges believe that allowing counsel-conducted voir dire simply takes up too much scarce judicial time. They have probably concluded that the time involved in counsel-conducted voir dire cannot be justified because to allow questioning by counsel would, in the usual case, result in no increase in the fairness of the trial. We share the belief that court-conducted questioning of prospective jurors, with the court having discretion to allow the attorneys to participate, results in the selection of fair and impartial juries. We do not think that juries are any less "fair" -- assuming one could accurately define the term in this context -- today than in the early 1970's.

Senator Grassley also submitted two questions. He referred to a portion of Mr. Whitley's testimony noting that as of 1980 only 19 states allowed attorneys to exercise primary control over the voir dire in criminal cases. He then requested: "(a) a current list of those states; (b) a list of those states that presently follow the federal rule on jury selection; and (c) the date of any change by a state to the federal system."

We do not have a current compilation of state laws on jury selection. To determine that information would require a review of the laws of all fifty states. In our view, such a task would be a misuse of attorney manpower. While state laws can certainly be helpful in providing insight for federal legislation in some cases, in light of the fact that there is no real information available indicating that the federal system requires change, the specifics of each state's laws on voir dire and the date of any change during the 1980's is of marginal relevance. The source for the statement that as of 1980 only 19 states allowed attorneys to exercise primary voir dire responsibility was Suggs and Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245, 251. The article did not list the states but referred to Van Dyke, Voir Dire, How Should it be Conducted to Ensure that Our Juries Are Fair and Impartial?, 3 Hastings Const. L.Q. 65, 95-97. The Van Dyke article listed the states where attorneys exercise primary control over voir dire as Alabama, California, Connecticut, Hawaii, Idaho, Iowa, Kansas, Louisiana, Mississippi, Montana, Nebraska, New York, North Dakota, South Dakota, Texas, Vermont, West Virginia, Wisconsin, and Wyoming.

Senator Grassley's second question was: "[A] witness representing the American Bar Association testified that the problems associated with the jury selection in the Independent Counsel's case against Michael Deaver could have been avoided if attorney's were permitted to exercise primary control over the voir dire. Do you agree?"

Since the Special Counsel's case against Mr. Deaver is presently ongoing, it would be improper for the Department to comment on any aspect of it.

I trust that the above information will prove helpful to the Subcommittee.

Sincerely,

John R. Bolton
Assistant Attorney General

Our next panel is representing the American Bar: Mr. Judah Best and Mr. William H. Greenhalgh, and also the National Association of Criminal Defense Lawyers, Mr. Marvin Miller.

Mr. Greenhalgh.

STATEMENT OF A PANEL CONSISTING OF WILLIAM W. GREENHALGH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, AND JUDAH BEST, CHAIRMAN-ELECT, LITIGATION SECTION, AMERICAN BAR ASSOCIATION, ON BEHALF OF THE AMERICAN BAR ASSOCIATION; AND MARVIN D. MILLER, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. **Greenhalgh**. Senator, we are privileged to be here again after a 3-year hiatus of having appeared before you, as I recall, in March of 1984. We have already submitted our statement and I just wish to draw your attention to a couple of situations which I think may be of interest to you.

It is too bad you cannot take this hearing downtown in Courtroom 2, U.S. District Court for the District of Columbia, this morning at 9:30. I respectfully direct your attention to page A4 of the Washington Post showing what is going on in a Federal district court with regard to jury selection.

What we have down there is the voir dire in the Michael Deaver trial, at which time the judge decided he would submit to a panel, the talesmen of 100, a 37-question, 12-page questionnaire after he voir dired himself, and then he would permit counsel to ask follow-up questions.

But in the meantime he excluded the press from the process, looking right in the face of Press Enterprise Co. against the Superior Court of California, 464 U.S., where the Chief Justice of the United States and a unanimous court said under the first amendment the press has the right to see a public trial.

Now, talk about taking time—that trial was suspended because the press went screaming to the fifth floor of the U.S. Courthouse to the U.S. Court of Appeals for the District of Columbia Circuit for a writ of mandamus to force him to rescind his order. They granted the writ yesterday. Now, the trial is to resume.

However, if you read the paper very carefully, guess what? The judge now says, my credibility with this jury panel is so eroded that I may have to dismiss this panel and start a new one, which will take 3 weeks' delay.

Now, if he had done what is permitted—and what we hope we can do is even after his general voir dire, he permitted counsel to voir dire. This is a perfect example of lawyers, you know, being, in effect, denied speedy justice as a result of what is going on as far as this judge is concerned.

I suggest to you that these learned judges who are trying to expedite this process with fairness and the impartiality of the Federal judiciary and, second, the time it takes that is involved—this trial would have gone a lot smoother had lawyers had this particular legislation where they could have speeded up this process. This is a perfect example of the timing of this hearing on this date.

Another one thing quickly, Your Honor. Three very controversial jury trials this year resulting in acquittals—under the California system, the *John Landis* case where he was accused with manslaughter with regard to the helicopter at the movie studio; if you got Jim Neal to write you a letter, who was defense counsel, as to the voir dire in that case; Barry Slotnik, who defended Bernard Goetz; and last but not least, William Bittman, who defended Raymond Donovan.

Both those States—California and New York—have mandatory voir dire, and when you are talking about the right to effective assistance to counsel in a public trial with regard to jury selection, those three lawyers would probably give you some idea how important it was to them and to their clients to have mandatory voir dire. The Litigation Section is composed of approximately 50,000 trial lawyers, located throughout the United States.

I will turn it over to my colleague, Mr. Best.

STATEMENT OF JUDAH BEST

Mr. **Best**. Mr. Chairman, my name is Judah Best. I will be chairman-elect of the Litigation Section of the American Bar Association commencing in August, and I appreciate the opportunity to appear before you on behalf of the section and of the American Bar Association.

The fact of the matter is that in approximately 44 percent of the State courts in the United States, attorneys are permitted to conduct voir dire. In approximately 36 percent of the remaining State jurisdictions, they split the duty with judges, and in the remaining approximately 30 percent, judges handle it.

As Robert Hanley, who is a noted trial lawyer and a former chairman of the Litigation Section, stated in a recent article, lawyers spend months preparing a case. They know their nuances, they know their theories, they know their defenses. Why on earth do they not have an opportunity to present their questions and get a sense, a nuance from the jury? I think there can be no satisfactory answer to that.

In some of the studies that have been conducted with regard to the efficacy of voir dire as presented by a judge rather than by the lawyers, it is stated that judge voir dire results in a less honest and forthcoming result from the jurors because, frankly, they are scared of the judge.

It is the position of the ABA's Section of Litigation that lawyers should have the right to conduct voir dire. Now, the argument is made that the judges will lose control. Based on my years of trial experience, I know of no Federal judge who would admit that he does not have control of his courtroom, and so I am confident that lawyers and judges can work out an accommodation if mandatory voir dire is permitted by the attorneys.

Thank you for the opportunity of making my remarks to you.

[Submissions of Messrs. Greenhalgh and Best follow:]

STATEMENT OF
WILLIAM W. GREENHALGH & JUDAH BEST
on behalf
of the
AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

My name is William W. Greenhalgh. I am a clinical professor of law at Georgetown University Law Center and Director of the E. Barrett Prettyman Program (L.L.M. in Trial Advocacy). I am past Chairperson of the American Bar Association's Section of Criminal Justice. With me today is Judah Best, an attorney actively engaged in trial practice here in Washington, D.C. and currently Chairman-Elect of the ABA's Litigation Section.

We are pleased to appear before you today on behalf of the American Bar Association to present testimony on S. 953 and S. 954, legislation to afford parties and their counsel the right to conduct the voir dire examination of prospective jurors in federal criminal and civil cases.

The American Bar Association's more than 330,000 members include persons from all parts of the legal system -- civil practitioners, persons both defending and prosecuting criminal cases, law teachers, judges, and others. Our policies thus reflect a variety of viewpoints and are an amalgam of a number of perspectives.

Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure currently govern the voir dire examination of prospective jurors. Both rules authorize the judge to conduct the voir dire examination and vest him or her with discretion as to whether counsel should be permitted to question prospective jurors. In practice, few federal judges permit counsel the opportunity to question prospective jurors directly.

ABA POLICIES

The American Bar Association believes that the opportunity to question prospective jurors in both criminal and civil cases is fundamental to the operation of the jury system in our country.

Over the past decade, the ABA has adopted resolutions on three separate occasions to articulate its concern about jury selection in federal courts.

In 1975, the ABA House of Delegates adopted a resolution sponsored by its Special Committee on Federal Practice and Procedure that expressed the Association's support for "...the concept of voir dire by counsel as a matter of right in federal civil and criminal cases." The following year the House of Delegates approved a resolution sponsored by the Litigation Section that recommended Rule 47(a) of the Federal Rules of Civil Procedure be amended to require that counsel be permitted "to conduct an oral examination of prospective jurors."

Finally, in 1981, the Criminal Justice Section brought a resolution to our House of Delegates recommending that Rule 24(a) of the Federal Rules of Criminal Procedure be amended to provide, among other things, that counsel "...be given a reasonable and adequate opportunity to directly question the prospective jurors, individually and as a panel...." The House of Delegates amended the recommendation to make it applicable, as well, to Rule 47(a) of the Federal Rules of Civil Procedure.

STANDARDS FOR CRIMINAL JUSTICE

Further, the ABA's highly acclaimed Standards for Criminal Justice

(Second Edition) also endorse the notion that counsel should have the opportunity to conduct a voir dire examination of prospective jurors. Standard 15-2.4 provides that

> Voir dire examination should disclose grounds for challenge for cause and facilitate intelligent exercise of peremptory challenges. Interrogation of jurors should be conducted initially and primarily by the judge, but counsel for each side should have the opportunity, subject to reasonable time limits, to question jurors directly, both individually, and as a panel. Where there is reason to believe the prospective jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, counsel should be given liberal opportunity to question jurors individually about the existence and extent of their preconceptions. It is the responsibility of the judge to prevent abuse of voir dire examination.

This identical language is also found in the ABA's Standards of Judicial Administration, Standards Relating to Trial Courts (Standard 2.12).

PENDING LEGISLATION

The American Bar Association strongly supports S. 953 and S. 954 now pending before you, and urges prompt action on this legislation. Both bills are consistent with the policies and standards outlined above.

Let us outline for you some of the rationale behind the ABA's position on these bills.

First, adoption of your legislation would help to achieve a more meaningful voir dire examination. Examination of potential jurors by only the trial judge must necessarily fall short of the mark. The judge does not have the intimate familiarity with the details of the case -- details which may well alert an interrogator to important nuances in juror responses.

Counsel, on the other hand, with the knowledge of all elements of the case, will recognize significant problems in answers to appropriate questions and press essential points with further questioning.

Some judges are particularly accommodating in putting questions proposed by counsel; others are not. But in neither instance is the result as effective as questions directly propounded by counsel.

Additionally, jurors have been known to shape their responses to judges along lines they expect the judges want to hear. The authoritarian judge figure does impact on answers given by prospective jurors.

Experienced federal practitioners regularly attend voir dire without participation and are exposed to a litany of rhetorical questions. This perfunctory performance by the court precludes a basis for the exercises of the challenges, both for cause and peremptory. The standard question often asked by the judge is, "Can you be fair?" To that question the jurors invariably answer in the affirmative. This is not an adequate exploration.

In United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), the court said:

> The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudice. Thus, it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause.

The candidate for the jury should reveal himself by his answers. The use of open-ended questions such as those beginning with "how" or "why" allow for response and should be followed up. Close-ended questions requiring only a "yes" or "no" answer perhaps tell the jury that the parties are not truly interested in learning about them. This is contrary to the purpose of voir dire, which is to probe deeply.

As the ABA's Trial Court Standards have noted, allowing the judge unfettered control of the questioning of jurors, "insulates the jury panel from direct interaction with the lawyers and often precludes penetrating question sequences that might reach more deeply into juror beliefs and reactions." See United States v. Salamone, 800 F.2d 1216 (3rd Cir. 1986) (district court abused its discretion in conducting voir dire by systematically excluding members of antigun control organization from a jury impaneled to hear alleged violations of gun control statutes) (copy attached). There are limits to what a trial judge can do in conducting an adequate examination. As one commentator has noted, "there are always points in practically every case which are peculiar to that case, and which, by the same token, are unknown to the trial judge, but known to defense counsel and the parties." (The Jury System in the Federal Courts, 26 F.R.D. 409, 467 (1961)).

Second, adoption of the pending legislation would not unduly lengthen the jury selection process. The time limits provided in both bills will preclude that. Further, there is some statistical evidence indicating that the participation of counsel in voir dire may not entail a lengthy proceeding. The 1977 survey revealed that 90% of all voir dire in federal criminal cases was estimated to take less than two hours, and 65% of the cases less than one hour with an average time of 50 minutes. (Bermant and Shepard, The Voir Dire Examination, Juror Challenges, and Adversary Advocacy (Federal Judicial Center 1978), 13). The greater the control exercised by the judge, the longer it took (71.3 3 minutes); counsel-conducted voir dire was shorter (45 minutes).

Despite the perceived and potential abuses of the voir dire by counsel, the author of the 1977 survey published by, the Federal Judicial Center noted, "The median estimated duration for criminal case examinations was 52 minutes with oral participation (of counsel) and 51 minutes without (by the judge alone)." A one-minute difference does not appear to justify the total exclusion of counsel.

CONCLUSION

The present jury selection practices in the federal courts are inefficient, ineffective and prejudical. The change which would be brought about by the enactment of S. 953 and S. 954 would make the jury selection system a better one, tending more to the selection of fair and impartial jurors able to decide cases without bias or prejudice. Federal judges will contirue to have control over the jury selection process, and authority to prevent any abuses. The overwhelming majority of state courts, according to one commentator, now hold that the attorney-conducted voir dire examination in criminal cases is essential to fundamental fairness under state constitutions and under the Sixth Amendment. (Gutman, The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right, 39 Brooklyn L. Rev. 290, 324 (1972)). The federal court system should here follow the lead provided by the states.

We thus strongly urge your prompt and favorable reporting of the two bills before you.

Mr. Best and I would be happy to respond to any questions you may have.

Attachments

ABA Policies relating to voir
dire - 1975, 1976, 1981

United States v. Salamone, 800 F.2d 1216 (3rd Cir. 1986)

ATTACHMENTS

Voire Dire policies adopted by the ABA House of Delegates

1975 - Recommendation of the Special Committee on Federal Practice and Procedure

> *Resolved,* That the American Bar Association supports the concept of *voir dire* by counsel as a matter of right in federal civil and criminal cases.

1976 - Recommendation of the Litigation Section

> *Resolved,* That the House of Delegates of the American Bar Association recommends to the United States Supreme Court that Rule 47(a) of the Federal Rules of Civil Procedure, governing the examination of jurors, be amended so as to read:
>
> "(a) Examination of Jurors. The court shall permit the parties or their attorneys to conduct oral examination of prospective jurors. The court may inquire of prospective jurors as a supplement to the examination by the parties."

1981 - Recommendation of the Criminal Justice Section

> *Resolved,* That the American Bar Association proposes that Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure be amended in substantially the following form:
>
> (a) *Examination.* Voir dire examination with the use of open-ended questions shall disclose information about the prospective jurors to facilitate the exercise of challenges for cause and preemptory challenges. The judge shall initially instruct on the principles, purposes, and procedure of the examination and may primarily conduct the questioning which shall include residence, occupation and employment address, previous services as a juror, in the case of Rule 24(a) attitude toward law enforcement, and prior contact with the defendant, counsel, or anticipated prosecution witnesses and in the case of Rule 47(a), prior contact with the parties, their counsel, or anticipated witnesses. Counsel for the defendant and the government or plaintiff will be given a reasonable and adequate opportunity to directly question the prospective jurors, individually and as a panel, and such questioning, if requested, shall be not less than 30 minutes for each side. The judge may permit the unrepresented defendant to question the jury, but subject to the same limitations as counsel. The judge may require counsel to submit proposed questions and will control the inquiry to prevent improper, argumentative, or irrelevant questioning. To expedite this examination, counsel will be furnished a list of the prospective jurors not later than 24 hours before the examination.

UNITED STATES of America

v.

SALAMONE, Salvatore, Appellant.

No. 85-5288.

United States Court of Appeals,
Third Circuit.

Argued Feb. 10, 1986.

Decided Sept. 9, 1986.

Defendant was convicted before the United States District Court for the Middle District of Pennsylvania, Malcolm Muir, J., of various firearms offenses, and he appealed. The Court of Appeals, A. Leon Higginbotham, Jr., Circuit Judge, held that: (1) exclusion of persons with affiliations to antigun control organization from defendant's petit jury did not violate requirement that defendant's jury reflect a fair cross section of the community, but (2) wholesale, arbitrary, and irrational exclusion of such members from jury was prejudicial error.

Reversed and remanded.

Stapleton, Circuit Judge, filed concurring opinion.

1. Jury ⇐33(1.1)

Defendant may establish constitutional violation by proving that jury venire did not reflect fair cross section of the community. U.S.C.A. Const.Amend. 6.

2. Jury ⇐33(1.1)

Prima facie violation of requirement that jury reflect fair cross section of community is established upon proof by defendant that group alleged to be excluded is "distinctive" group in community, that representation of that group in venires from which juries are selected is not fair and reasonable in relation to number of such persons in the community, and that the underrepresentation is due to systematic exclusion of group in jury-selection process. U.S.C.A. Const.Amend. 6.

3. Jury ⇐33(2.1)

"Death qualification" refers to exclusion of those prospective jurors whose conscientious or religious scruples toward imposition of death penalty would prevent or substantially impair performance of their duties as jurors in accordance with their instructions and oath.

See publication Words and Phrases for other judicial constructions and definitions.

4. Jury ⇐33(1.2)

Exclusion of members of antigun control organization from defendant's petit jury did not violate requirement that defendant's jury reflect a fair cross section of the community. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐1035(6)

In general, allegation on appeal that district judge improperly conducted voir dire examination of prospective jurors, in absence of plain error, will not be heard, where no objection is made before district court. Fed.Rules Cr.Proc.Rules 51, 52(b), 18 U.S.C.A.

6. Criminal Law ⇐1035(5)

Failure of defendant, charged with various violations of gun control statutes, to renew his earlier objection was reasonably justified and did not extinguish his claim on review that trial court abused its discretion during voir dire by excluding potential jurors due to their affiliation with antigun control organization, where initial, contemporaneous objection by defense attorney adequately apprised trial court of nature of defendant's claim, and trial court's particularized inquiry of one potential juror may have indirectly suggested to defense counsel that trial court viewed members of organization as presumptively biased. 18 U.S.C.A. §§ 2, 371, 924(a); 26 U.S.C.A. § 5861(c, d).

7. Jury ⇐131(2)

Discretion of trial court in determining how best to conduct voir dire extends to determination of what questions should be asked to potential jurors. Fed.Rules Cr.Proc.Rule 24, 18 U.S.C.A.

. Jury ⇐97(1)

Central inquiry in determination whether juror should be excused for cause is whether juror holds particular belief or opinion that will prevent or substantially impair performance of his duties as juror in accordance with his instructions and his oath.

. Jury ⇐97(3)

Absent the requisite nexus, i.e., that the challenged affiliation will prevent or substantially impair a juror's impartiality, no juror may be excluded for cause on basis of his or her membership in an organization that adheres to a particular view; failure to make necessary inquiry deprives trial court of benefit of factual predicate that justifies exclusion for cause. Fed. Rules Cr.Proc.Rule 24, 18 U.S.C.A.

10. Criminal Law ⇐1166.16
Jury ⇐33(1.2)

Wholesale, arbitrary, and irrational exclusion of persons with affiliations with antigun control organization from jury impaneled to hear alleged violations of gun control statutes was prejudicial error.

11. Jury ⇐33(1.1)

Defendant is entitled to jury from which no group has been summarily excluded without regard to their ability to serve as jurors in the particular case.

Alan Silber (argued), Merrill N. Rubin, Silber & Rubin, P.C., New York City and Newark, N.J., Stanley Weinberg, Robert C. Fogelnest, Fogelnest & Lynn, Philadelphia, Pa. and Bloomsburg, Pa., Robert Dowlut, Washington, D.C., for appellant.

Joel M. Friedman, U.S. Dept. of Justice, Philadelphia Strike Force, Organized Crime & Racketeering Section, Philadelphia, Pa., Karen Skrivseth (argued), William C. Bryson, U.S. Dept. of Justice, Washington, D.C., for appellee.

Before HIGGINBOTHAM and STAPLETON, Circuit Judges, and TEITELBAUM, District Judge.*

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.

This appeal arises from the conviction of appellant Salvatore Salamone pursuant to a multicount indictment charging him with various firearms offenses.[1] Our opinion is restricted to one issue: whether potential jurors in an action involving charges brought under the gun control statutes may be dismissed for cause solely due to their affiliation with the National Rifle Association.[2] For the reasons set forth below we will reverse the judgment of the district court.

I.

Appellant was tried before a jury in the United States District Court for the Middle

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* Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

[1] Appellant Salamone was convicted on one count of possession of an illegally made machine gun in violation of 26 U.S.C. § 5861(c); one count of possession of an unregistered machine gun in violation of 26 U.S.C. § 5861(d); one count of conspiracy to violate 18 U.S.C. § 924(a) relating to firearms offenses, in violation of 18 U.S.C. § 371; and three counts of falsifying firearms transaction records in violation of 18 U.S.C. §§ 2 and 924(a).

[2] Appellant also raises the following contentions:

1. Salamone was unfairly prejudiced by the improper admission of "other crimes" evidence by the government.
2. The trial court erred in permitting the government to prove multiple conspiracies when only a single conspiracy was charged.
3. Salamone's conviction for substantive offenses pursuant to Counts 5, 6, and 7 must be reversed if this court finds error in the conspiracy conviction pursuant to Count 4.
4. The trial court's accomplice instructions deprived Salamone of a fair trial.
5. The sentence imposed by the trial court constitutes a violation of due process and an abuse of discretion pursuant to Federal Rule of Criminal Procedure 32 because it was disproportionately severe.

After carefully reviewing the foregoing contentions, we find them to be without merit.

District of Pennsylvania on various firearms charges alleging the possession of and failure to register an illegally made machine gun, and conspiracy to falsify, and falsification of, firearms transaction records through the use of fictitious names for the purchase of handguns. Prior to trial, during *voir dire*, the district court excused for cause one potential juror and five potential alternates solely on the basis of their affiliation with the National Rifle Association ("NRA"). Of the jurors selected, ten had firearms in their homes. Of the six alternates selected, five had firearms in their homes. Two of the alternates ultimately served on the jury. Salamone was convicted on six of the seven counts with which he was charged. He was sentenced to a total of twenty years imprisonment and $35,000 in fines. This appeal followed.

II.

Appellant's challenge to the constitution of the jury before which he was tried is two-fold. First, Salamone analogizes the exclusion of NRA members from his petit jury to the "so-called 'death-qualified' juries wherein those individuals who adamantly refuse to impose the death penalty are disqualified from jury service." Brief of Defendant Appellant at 48. Comparing the instant appeal with the Supreme Court's seminal case on juror disqualification in capital cases, *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), Salamone contends that "[a] jury swept clean of those who oppose[ ] gun control legislation, but who nevertheless were not asked whether they would in every case acquit solely because the charges involved the possession of weapons, cannot withstand the *Witherspoon* test." Brief of Defendant Appellant at 49. Second, Salamone maintains that his sixth amendment right to an impartial jury selected from a fair cross-section of the community was violated. In response, the government contends that Salamone's *Witherspoon* argument cannot prevail because "[a]ppellant has clearly failed to demonstrate that a jury is not impartial when potential jurors reasonably found by the judge to be hostile to enforcement of the statute involved have been excluded." Brief for the United States at 20. With regard to appellant's sixth amendment claim, the government first argues that the fair cross-section guarantee does not extend to the selection of the actual petit jury before which a defendant is tried. Alternatively, the government argues that even if applicable, the proof requirements established under *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) and *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) have not been satisfied and, thus, Salamone's fair cross-section challenge cannot be sustained. In addition to the arguments advanced by the parties, *amicus curiae*, National Rifle Association of America, contends that the alleged violation of appellant's right to an impartial jury is rooted in the fifth amendment's guarantee of due process. *See* Brief of Amicus Curiae National Rifle Association of America ("NRA Brief") at 7-10. We shall consider appellant's sixth amendment claim first.

III.

[1, 2] "[T]he Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 537, 95 S.Ct. 692, 701, 42 L.Ed.2d 690 (1975). A defendant may establish a constitutional violation by proving that the jury venire did not reflect a fair cross-section of the community. A prima facie violation of the fair cross-section requirement is established upon proof by the defendant "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*,

439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

[3] Since *Taylor*, the Supreme Court has consistently maintained that the fair cross-section guarantee is narrow in scope and imposes no requirement that a particular petit jury itself consist of representatives from all distinctive groups in the community. *See Taylor*, 419 U.S. at 538, 95 S.Ct. at 701. This Term, in an opinion issued after oral argument in the instant appeal, *Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Court reiterated its reluctance to bring petit juries within the ambit of the fair cross-section analysis. *McCree* addressed the claim that "death qualification"[3] violates a defendant's right under the sixth and fourteenth amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross-section of the community. In essence, McCree argued that the exclusion of jurors with moral objections to the imposition of the death penalty from the guilt phase of his bifurcated trial resulted in a "conviction-prone" jury rather than one representative of the various viewpoints in the community. Rejecting first the empirical foundation of McCree's claim, *i.e.*, that "death-qualified" juries are "conviction-prone," the Court proceeded to reject the constitutional basis of his argument. Writing for the majority, Justice Rehnquist stated that "[t]he limited scope of the fair cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury ... [Thus,] an extension of the fair cross-section requirement to petit juries would be unworkable and unsound...." 106 S.Ct. at 1765.

[4] The *McCree* Court did not undertake to fashion a test specifically tailored to govern sixth amendment challenges to the selection methods or composition of petit juries. Instead, the Court noted that under the current proof requirements of the sixth amendment fair cross-section analysis, McCree's challenge to the selection of his petit jury could not prevail. Focusing on the threshold requirement of the *Duren* test, the Court indicated that the category of "distinctive" groups, the exclusion of which is prohibited by the sixth amendment, is narrowly circumscribed. The Court observed: "The essence of a 'fair cross-section' claim is the systematic exclusion of 'a "distinctive" group in the community.' In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors ... are not 'distinctive groups' for fair cross-section purposes." 106 S.Ct. at 1765 (citations omitted).[4] Similarly, applying the *Duren* requirements to the instant appeal, Salamone's sixth amendment claim that the exclusion of NRA members from his petit jury deprived him of a representative jury must also fail.[5] The strong suggestion

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[3] "Death qualification" refers to the exclusion of "the so-called '*Witherspoon*-excludable[s]'" from a jury panel. *See Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 1761, 90 L.Ed.2d 137 (1986). "*Witherspoon*-excludable," in turn, refers to a prospective juror whose conscientious or religious scruples toward the imposition of the death penalty would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *See Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), and modifying *Witherspoon v. Illinois*, 391 U.S. 510, 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (1968)).

[4] The government in the instant appeal also argued along this line: "We do not believe that cross-section analysis turns on the views of a distinctive group on a single issue." *See* Supplemental Brief For the United States at 14–15.

[5] Although Salamone contends that an essential element of the *McCree* calculus is lacking here, *i.e.*, the determination that the shared attitudes of NRA supporters would in fact "prevent or substantially impair" their ability to sit impartially in cases involving illegal possession of firearms, we have little doubt that under *McCree* the exclusion of NRA members after proper inquiry would not run afoul of the fair cross-section requirement of the sixth amendment. *See McCree*, 106 S.Ct. at 1766 ("In sum, '*Witherspoon*-excludables,' or for that matter any other

from the *McCree* Court that the "shared attitudes" of a given group is insufficient to qualify it as a "distinctive group" in society for purposes of the sixth amendment compels us to reject Salamone's fair cross-section challenge. That Salamone's claim fails under the analytic framework of the fair cross-section requirement, however, does not leave appellant without a cognizable challenge of the selection of his petit jury.

IV.

Although appellant Salamone's claim does not rise to the level of a sixth amendment violation, our review of the record in light of his *Witherspoon* argument leads us inexorably to the conclusion that the trial judge abused his discretion in conducting the *voir dire* proceedings.

During *voir dire* for the main jury panel the court posed the following questions to the prospective jurors:

> THE COURT: ... Are you now or have you ever been a member of or affiliated in any way with the National Rifle Association?
>
> MR. LAUGHLIN: I've been a member of the NRA.
>
> THE COURT: All right. Do you support the principles of that organization, Mr. Laughlin?
>
> MR. LAUGHLIN: Yes, I do.
>
> THE COURT: Okay. Mrs. Houtz.
>
> MRS. HOUTZ: My husband is a member of NRA. He does support it.
>
> THE COURT: And he does support it?
>
> MRS. HOUTZ: Yes.
>
> THE COURT: All right. Are you now or have you ever been a member of or affiliated in any way with a gun, marksmanship or sporting club/organization? Mr. Laughlin.
>
> MR. LAUGHLIN: I belong to the Bucktail club and hunting club in Emporium.
>
> THE COURT: Are you now or have you ever been a member of or affiliated in any way with a survivalist club or organization?
>
> The United States Constitution, as amended by the Bill of Rights, the first ten amendments, it states in one of those amendments, "The right of the people to keep and bear arms shall not be infringed." The United States has, in fact, laws restricting the possession and transfer of automatic weapons and machine guns; additionally, it has laws requiring, under most circumstances, buyers of firearms to supply certain information and to fill out documents at the time firearms are purchased. The Courts of the United States have consistently ruled that such laws are proper and are not in conflict with the provision of the Bill of Rights which I have just read to you about the right of the people to keep and bear arms not being infringed. Despite such Court rulings, is any juror opposed to such laws on constitutional grounds or other grounds?
>
> (NO RESPONSE)
>
> THE COURT: The possession and transfer of an automatic weapon or machine gun is, in most cases, illegal. If I should instruct you along those lines at the conclusion of the trial, with [sic] any juror have any difficulty following any such instruction for any reason? Is any juror opposed to gun control? I would assume, Mr. Laughlin, you are opposed to it?
>
> MR. LAUGHLIN: That's correct, yes.
>
> THE COURT: And I would assume, Mrs. Houtz, you are opposed to it?
>
> MRS. HOUTZ: Yes.
>
> THE COURT: Anybody else opposed to gun control? Mr. Hayes.
>
> MR. HAYES: Yes.
>
> THE COURT: Are you opposed to all gun control or small arms control or what?

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group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement.").

> MR. HAYES: I would just be opposed to shotguns and rifles.
>
> THE COURT: Shotguns and rifles, but you would not be opposed to control with respect to, let's say, Saturday night specials, is that what you're saying?
>
> MR. HAYES: Yes.
>
> THE COURT: All right. Anybody else with a yes answer?
>
> Notwithstanding your opposition to certain gun control, Mr. Hayes, do you feel you could serve fairly and impartially on this jury?
>
> MR. HAYES: Yes.

App. 63A–65A.

After completion of *voir dire*, the district court entertained challenges for cause. The following exchange took place:

> MR. CLARK: Your Honor, the government would challenge for cause Mr. Laughlin.
>
> THE COURT: On what ground?
>
> . . . . .
>
> MR. CLARK: He stated he was a former member of the NRA and is—
>
> THE COURT: Well, why—
>
> MR. CLARK: He's a member and firm opponent—
>
> THE COURT: Wait.
>
> MR. CLARK: —of gun control.
>
> THE COURT: Well, why is that disqualification for cause? It may be, but I need some illumination on that.
>
> MR. CLARK: Your Honor, the government's position in respect to that would be that because the charges here deal with the regulation of the possession of automatic weapons, machine guns and because the charges also deal with the falsification of ATF Forms 4473, which are forms of gun control.
>
> THE COURT: Well, I have got enough on it now. What is your—do you oppose that challenge?
>
> MR. CASALE: Yes.
>
> THE COURT: What is the basis of the opposition?
>
> . . . . .
>
> MR. CASALE: The basis of the opposition is that the defense doesn't feel that any member of the NRA *automatically disqualifies* unless he says, I can't sit on this jury fairly.
>
> THE COURT: Well, the NRA blocked a bill in the last Congress which would have prevented the importation and sale and, I believe, manufacture of armor piercing bullets. That legislation was supported by the police chiefs and police organizations throughout the nation. And *I think that somebody who is a member of that organization may well not be able to sit on this case impartially.* So I'll grant that one.

App. 70A–71A (emphasis added). The government made no further challenges for cause.[6]

During *voir dire* for the selection of alternates, several jurors indicated some affiliation with the NRA. Mrs. Hart and Mrs. Shatford stated that their husbands were members of the NRA. *See* App. 94A, 98A. Mr. Stavisky indicated that he supported the principles of the NRA. *See* App. 97A. Mr. Brown represented that he was a life member of the NRA. *See* App. 102A. And, finally, Mrs. Gemberling indicated that five of her relatives were members of the NRA. *See* App. 107A. All were challenged and excluded for cause solely on the basis of their affiliation with the NRA.[7]

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[6] Both Mrs. Houtz and Mr. Hayes were eliminated from the jury on peremptory challenges. It is unclear from the record which party exercised the challenges.

[7] During *voir dire* of the alternates, the court did not specifically repeat the questions that had been directed to the main panel members. Rather, each juror was instructed to inform the court if they would have answered any of the questions posed to the main panel in the affirmative. This procedure is considered within the trial court's discretion in conducting *voir dire*. *See United States v. Delval,* 600 F.2d 1098, 1102 (5th Cir.1979) (decision whether to question prospective jurors individually or collectively within trial court's discretion); *accord United States v. Starks,* 515 F.2d 112, 124–25 (3d Cir.1975) (recognizing discretion, yet favoring individual inquiry on facts of that case). The following

A.

[5] In general, the allegation on appeal that the trial judge improperly conducted the *voir dire* examination of prospective jurors, in the absence of plain error, will not be heard where no objection is made before the district court. Fed.R.Crim.P. 51, 52(b). *See also United States v. Bryant*, 471 F.2d 1040, 1044 (5th Cir.1972) ("[T]he method and manner of conducting a *voir dire* are left to the discretion of the trial judge and ... ordinarily, unless specific objection is made at the time, *voir dire* issues raised on appeal will not be noticed."). *Accord United States v. Dickens*, 695 F.2d 765, 774–75 (3d Cir.1982) (trial court's failure to question jurors regarding racial prejudice not an abuse of discretion where defendants never objected to scope of inquiry); *United States v. Flores-Elias*, 650 F.2d 1149, 1151 (9th Cir.1981) (where neither party submitted additional questions or objected to the scope of the court's questions, the appellate court would review the conduct of *voir dire* only to determine whether there was plain error). Without expressly arguing that Salamone failed to preserve his jury selection challenge for appeal, the government twice notes that appellant did not renew his objections to the district court's exclusion for cause of all potential jurors with NRA affiliations at the time the alternates were questioned. *See* Brief for the United States at 15; Supplemental Brief for the United States at 13 n. 6. Thus, as a preliminary, matter. we find that Salamone's initial objection in light of the subsequent circumstances surrounding the *voir dire* of the alternates was sufficient to preserve the selection issue for this appeal.

During *voir dire* of the main jury panel, defense counsel expressly registered an objection to the summary dismissal of Mr. Laughlin stating that "the defense doesn't feel that any member of the NRA automatically disqualifies unless he says, I can't sit on this jury fairly." App. 71A. The trial judge nevertheless sustained the challenge pointing to recent action of the NRA on legislation before the United States Congress as indicative of the probable bias of "member[s] of that organization." App. 71A. Subsequently, near the end of the *voir dire* of the main panel, the trial court volunteered the following statement:

> THE COURT: Before I forget it, I suppose it would be appropriate, since the government apparently is uneasy about people who own guns, for me to tell you what I do have.
>
> I have a shotgun. I don't know where any shells are for it, and I never killed anything with it. I have a very fine .45

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excerpts reflect the responses of the excluded alternates with regard to their affiliation with the NRA.

> THE COURT: Would you have answered yes to any of the questions?
> MS. SHATFORD: Yes.
> THE COURT: What ones?
> MS. SHATFORD: ... My husband does own guns. He is a member of the NRA.

App. 94A.

> THE COURT: Would you have answered yes to some of the questions?
> MR. STAVISKY: Yes.
> THE COURT: What ones?
> MR. STAVISKY: One is, I have firearms, hunting rifles, and I support the principles of the NRA; I'm not a member.

App. 97A.

> THE COURT: Would you have answered yes to any of the questions?
> MRS. HART: Yes. My husband is a member of the NRA and we have—he has several rifles and shotguns and he has a handgun.

App. 98A.

> THE COURT: Would you have answered yes to any of [the questions we put to the first jurors]?
> MR. BROWN: Yes.
> THE COURT: What ones?
> MR. BROWN: I'm a life member of the NRA. I own hunting guns.

App. 102A

> THE COURT: Would you have answered yes to any of [the questions we asked the first jurors in this case?]
> MRS. GEMBERLING: Yes.
> THE COURT: What ones?
> MRS. GEMBERLING: ... There's five of them in my family that are members of the NRA. My husband has hunting guns and pistols and I am opposed to gun control.

App. 107A.

Each of the alternates were summarily dismissed *solely* on the basis of their "close affiliation with the NRA," *see* App. 100A, without further inquiry from the court or argument by counsel. *See also* App. at 105A, 107A.

> which was given to me by my brother-in-law as appreciation for having handled the affairs of his father. It's a marksman's gun. I have never shot that. I don't know where the bullets are for it, but it's a very expensive gun. And my brother-in-law is a member of the NRA, and a very sta[un]ch member. He wanted to give me a membership in the organization and I refused. And I do not support the principles of the NRA.
>
> I cannot grasp why they [the NRA] really opposed that armor piercing bullet—which I think is very much a concern to police chiefs and policemen.

App. 82A–83A. Finally, just prior to the commencement of *voir dire* of the alternates, the following colloquy took place between defense counsel and the trial judge when defense counsel attempted to employ reasoning similar to that advanced for the exclusion of NRA members to support a challenge for cause of a juror who advocated gun control:[8]

> THE COURT: Do you have any [challenges for cause], sir?
>
> MR. CASALE: Miss Techmanski-Hoffman.
>
> THE COURT: On what basis?
>
> MR. CASALE: Who states she supports gun control. I think it's the vice versa of the NRA argument the government has made.
>
> THE COURT: Well, it doesn't seem to me it is, but why—elaborate on the argument a bit.
>
> MR. CASALE: I feel that it may—her support for gun control, not being neutral, may prejudice her in that this case involves regulations involving gun control.
>
> THE COURT: All right. Well, I'll ask her.
>
> . . . .
>
> Miss Techmanski-Hoffman, do you feel that your ... [advocacy of] handgun control would in any way affect your ability to be fair in this case?
>
> MS. HOFFMAN: I've thought about that, Your Honor, I think it might.
>
> THE COURT: All right.

App. 84A–85A.

[6] We conclude that the initial, contemporaneous objection by defense attorney, Casale, adequately apprised the trial judge of the nature of Salamone's claim. In light of the foregoing circumstances, any failure of appellant to renew his earlier objection was reasonably justified and will not operate to extinguish his claim on review. After expressing a general view about the policy positions advanced by the NRA, the trial judge proceeded to voice his own personal rejection of that organization's principles. The trial court's particularized inquiry of Ms. Hoffman, though appropriate in and of itself, may have indirectly suggested to defense counsel that the trial judge viewed NRA members as presumptively biased in cases involving gun control but not advocates of gun control. Under these circumstances, we do not think it was necessary for Salamone to persist in raising his objection to the summary exclusion of jurors with affiliations with the NRA as a prerequisite to raising his claim on appeal. *Cf. Industrial Development Board of the Town of Section, Alabama v. Fuqua Industries*, 523 F.2d 1226, 1237 (5th Cir.1975)("The failure to object [to jury instructions] may be disregarded if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing.") (quoting C. Wright & A. Miller, Federal Practice and Procedure § 2553, at 639–40 (1970)).

B.

[7] In *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981), the Supreme Court observed that "*[v]oir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will

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[8] When asked whether she would have responded affirmatively to any of the questions posed to the main panel, the challenged juror responded:

> MS. HOFFMAN: My husband and I are advocates of handgun control.

App. 79A.

be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges." *Id.* at 188, 101 S.Ct. at 1634 (citations omitted). Federal Rule of Criminal Procedure 24[9] commits to the trial judge the function of conducting an appropriate *voir dire.* "Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire.*" *Rosales-Lopez,* 451 U.S. at 189, 101 S.Ct. at 1634. This discretion extends to the determination of what questions should be asked to the potential jurors. *See generally Smith v. United States,* 431 U.S. 291, 308, 97 S.Ct. 1756, 1767, 52 L.Ed.2d 234 (1977); *United States v. McDonnell,* 573 F.2d 165, 166 (3d Cir.1978); *United States v. Segal,* 534 F.2d 578, 581 (3d Cir. 1976). "This 'testing' by *voir dire* remains a preferred and effective means of determining a juror's impartiality and assuring the accused of a fair trial." *United States v. Martin,* 746 F.2d 964, 973 (3d Cir.1984).

According full recognition to these general principles, however, it is nonetheless equally clear that the trial judge's broad discretion is not without limitation. "[W]hile impaneling a jury the trial court has a serious duty to determine the question of actual bias.... In exercising its discretion, the trial court must be zealous to protect the rights of an accused." *Dennis v. United States,* 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734 (1950). Thus, the discretion committed to the trial court is "subject to the essential demands of fairness." *Aldridge v. United States,* 283 U.S. 308, 310, 51 S.Ct. 470, 471, 75 L.Ed. 1054 (1931); *United States v. Wooton,* 518 F.2d 943, 945 (3d Cir.), *cert. denied,* 423 U.S. 895, 96 S.Ct. 196, 46 L.Ed.2d 128 (1975); *United States v. Napoleone,* 349 F.2d 350, 353 (3d Cir.1965).

In the instant appeal, Salamone's challenge to the district court's *voir dire* does not allege a failure to uncover actual bias thereby resulting in the paneling of partial jurors. Rather, Salamone's objection is to the *presumed* bias of potential jurors which occasioned the arbitrary exclusion of an entire class of otherwise qualified jurors from his panel. "In disqualifying all NRA-related jurors without particularized inquiry," Salamone argues, "the trial judge simply assumed that any person connected with that association was incapable of fairly applying existing law."[10] Supplemental Brief of Defendant-Appellant at 3. *Compare King v. State,* 287 Md. 530, 414 A.2d 909 (Ct.App.1980) (in prosecution for distribution and for possession of marijuana, error to exclude two jurors for cause on basis that they favored change in law with regard to possession and distribution of marijuana without further inquiry into their ability to set aside their personal beliefs and apply the law to the facts).

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[9] Rule 24 provides in pertinent part:

> (a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

[10] Salamone further suggests that

> [t]his unfounded assumption—which would render the President of the United States, the Vice-President, their wives, and over 3 million other Americans unfit to serve as jurors in gun-law cases—is flatly inconsistent with our democratic traditions. Its effect [is to] invidiously ... exclude from appellant's jury all persons connected to a distinct group solely because that group had chosen to affiliate for a political purpose.

Supplemental Brief of Defendant-Appellant at 3–4. More specifically, *Amicus* National Rifle Association argues that the conduct of the district court constitutes an encroachment on the excluded jurors' first amendment rights of freedom of association. *See* NRA Brief at 10–11. Because we consider only the rights of the accused, we do not reach the first amendment issue.

The government contends that no abuse occurs in the exclusion of jurors whose views on gun control might affect their ability to serve impartially on a jury considering implementation of gun control statutes. The government conveniently ignores, however, the total absence on this record of any indication that the excluded jurors individually possessed such views which would rightfully justify their dismissal. Instead, the government relies on a theory of "implied bias,"[11] *see Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), in suggesting that "where as here, the charges involve state and federal gun registration—a subject on which the NRA's opposition is well-known—a trial judge is well within his discretion in excluding those opponents from the jury for cause." Brief for the United States at 18 n. 8. Under such circumstances, the government maintains "[i]f the judge believes, as he reasonably could, that bias against enforcing a particular statute would make it difficult for the juror to vote for conviction even if the evidence supported guilt, additional questioning would simply be superfluous." *Id.* at 19.

We find the government's position untenable and potentially dangerous. To allow trial judges and prosecutors to determine juror eligibility based solely on their perceptions of the external associations of a juror threatens the heretofore guarded right of an accused to a fair trial by an impartial jury as well as the integrity of the judicial process as a whole. Taken to its illogical conclusion, the government's position would sanction, *inter alia*, the summary exclusion for cause of NAACP members from cases seeking the enforcement of civil rights statutes, Moral Majority activists from pornography cases, Catholics from cases involving abortion clinic protests, members of NOW from sex discrimination cases, and subscribers to Consumer Reports from cases involving products liability claims.[12]

[8, 9] Moreover, the government's position misconceives the grounds for juror dis-

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[11] In *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), the Supreme Court declined to impute bias to a properly seated juror who subsequently applied for employment with the District Attorney's Office prosecuting the case on which he sat. The Court held that a post-conviction hearing in which defendant is afforded the opportunity to prove actual bias was all that was constitutionally required. *See id.* at 217, 102 S.Ct. at 946. In a separate concurrence. Justice O'Connor indicated her belief that the presumption of implied bias may be appropriate under certain circumstances. *See id.* at 222, 102 S.Ct. at 948. (O'Connor, J., concurring) ("Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction."). While we make no categorical rejection of the theory of "implied bias", we note that Justice O'Connor's hypotheticals bear no resemblance to this case.

Just recently this court considered the propriety of the trial court's *refusal* to exclude a juror under the "implied bias" theory. *See United States v. Ferri*, 778 F.2d 985 (3d Cir.1985) (refusing to find error in the district court's refusal to disqualify a juror under the theory of implied bias); *see also Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950) (rejecting argument that employees of Federal Government were inherently biased in contempt action for failure to appear before the House Committee on UnAmerican Activities and therefore should have been excluded for cause on *voir dire*); *Richardson v. Communication Workers of America*, 530 F.2d 126 (8th Cir.1976) (finding no abuse of discretion by trial court in refusing to summarily disqualify from jury all union members without some indication of bias in wrongfully discharged employee's action against unions).

[12] We recognize that the government's argument rests upon a theory of implied partiality of prospective jurors who belong to "anti-enforcement" organizations. However, we think that the distinction the government attempts to make is precarious at best. Members of an overzealous organization favoring expansive application of particular statutes may likewise be "presumed" to lack the requisite impartiality to faithfully apply the law to the facts adduced at trial. Arguments similar to the government's have been rejected in other contexts. *See, e.g., United States v. Alabama*, 582 F.Supp. 1197, 1203 (N.D.Ala.1984) ("[J]udge's color, sex or religion does not constitue bias in favor of that color, sex or religion."); *Pennsylvania v. Local Union 542*, 388 F.Supp. 155, 165 (E.D.Pa.1974) (Black judge is not *per se* disqualified from adjudicating claims of racial discrimination.).

qualification. "Jury competence is an individual rather than a group or class matter." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 986, 90 L.Ed. 1181 (1946). Challenges for cause "permit rejection of jurors on narrowly specified, provable and legally cognizable bas[e]s of partiality." *Swain v. Alabama*, 380 U.S. 202, 220, 85 S.Ct. 824, 836, 13 L.Ed.2d 759 (1965). The central inquiry in the determination whether a juror should be excused for cause is whether the juror holds a particular belief or opinion that will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). *See also Patton v. Yount*, 467 U.S. 1025, 1036–37, 104 S.Ct. 2885, 2891–92 & n. 12, 81 L.Ed.2d 847 (1984) (noting that the constitutional standard for juror impartiality rests on the determination whether "he can lay aside his opinion and render a verdict based on the evidence presented in court"). Juror bias need not be established with "unmistakable clarity." *Witt*, 105 S.Ct. at 852. Thus, the factual determination by the trial court whether a juror can in fact serve impartially is entitled to "special deference" by the reviewing court. *Yount*, 104 S.Ct. at 2892. In the instant appeal, however, at no time were the excluded jurors questioned as to their ability to faithfully and impartially apply the law. Indeed, no inquiries whatsoever were directed to the excluded jurors to determine the nature and extent of their commitment to any principles that might have impaired their ability to serve impartially. While we recognize that the scope and content of *voir dire* is committed to the sound discretion of the trial court, that discretion will "include[ ] the decision as to what questions should be asked when the court itself decides to examine the prospective jurors *so long as inquiries relevant to the discovery of actual bias are not omitted.*" *United States v. Dansker*, 537 F.2d 40, 56 (3d Cir.1976) (emphasis added). Where the appropriate inquiries have been made and the district court has made a judgment on the basis of the jurors' responses, normally, that judgment will not be disturbed.[13] The usual factors cautioning restraint in appellate review, *i.e.*, credibility and demeanor evidence, however, are simply absent from this record. Thus, the "factual determination" by the district court in the instant appeal, being totally devoid of any foundation, leaves us with the single conclusion that the *voir dire* was inadequate to preserve and protect the rights of the accused. *See Dennis*, 339 U.S. at 168, 70 S.Ct. at 521. Absent the requisite nexus—that the challenged affiliation will "prevent or substantially impair" a juror's impartiality—no juror may be excluded for cause on the basis of his or her membership in an organization that adheres to a particular view. Failure to make the necessary inquiry deprives the trial court of the benefit of the factual predicate that justifies an exclusion for cause. In the words of Mr. Justice Murphy in *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946), uttered over forty years ago, the conduct of the trial judge and the position urged by the government today would "open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." [14]

[10] We conclude that the cursory disqualification by the district judge of all jurors with NRA affiliations constitutes an

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[13] Nothing in this opinion is intended to upset settled practice in the district courts of excluding without further inquiry prospective jurors with well recognized characteristics warranting dismissal, such as blood relation to the parties or counsel.

[14] *Cf. Barber v. Ponte*, 772 F.2d 982, 1000 (1st Cir.1985) (in banc) (distinguishing between challenges to petit juries on grounds of statistical disparity and on grounds of specific and systematic exclusion) ("If certain people are specifically and systematically excluded from jury duty, then the jury-administrating authority would have created its own group. Clearly, the state has no right to deliberately exclude specific classes or groups from juries without some very special reason. Thus, it may not *forbid* blue-collar workers, chess players, Masons, etc., from serving on juries.") (emphasis in original).

abuse of discretion and is not in accord with the "essential demands of fairness" to which appellant was entitled.

C.

The question remains, however, whether Salamone is entitled to relief on this basis. In this Circuit we adhere to the rule that "the trial court's determination as to a juror's actual bias will be reversed only for a manifest abuse of discretion." *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 934 (3d Cir.1974) (citing *Government of Virgin Islands v. Williams*, 476 F.2d 771, 775 (3d Cir.1973)). As indicated above, we think that such a "manifest abuse" is evident on this record, and on this basis alone Salamone is entitled to a new trial.[15] The government, however, citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), properly notes that not every error, even constitutional error, requires automatic reversal of a judgment of conviction. Thus, the government maintains that, manifest abuse notwithstanding, the harmless error doctrine applies and the improper exclusion of a juror for cause is not reversible error unless accompanied by a showing of substantial prejudice to the defendant. *See* Supplemental Brief for the United States at 17–19. Salamone argues that because the abuse of discretion involved in the instant proceeding produced a result more analogous to the systematic exclusion of specific groups from petit and grand juries, which the Supreme Court has indicated requires automatic reversal, *see, e.g., Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (exclusion of blacks); *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946) (exclusion of women); *Thiel v. Southern Pacific, Co.*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (exclusion of wage-laborers), his claim similarly "is not amenable to harmless-error review." Supplemental Brief of Defendant-Appellant at 2–5 (quoting *Vasquez v. Hillery*, — U.S. —, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986)).

At the outset, we note that were we faced with the inadequate questioning of a single excluded juror we might apply a different standard for determining the prejudicial effect of the erroneous exclusion. However, where such a "manifest abuse of discretion" results in the wholesale exclusion of a particular group, we do not deem it necessary for the defendant to affirmatively demonstrate the existence of actual prejudice in the resulting jury panel. Under such circumstances, prejudice may be presumed. As the Supreme Court observed in *Peters v. Kiff*,[16] 407 U.S. 493, 504, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972):

> It is the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case. Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty.

In the instant appeal, essential demands of fairness dictate that the errors of the prosecutor and trial judge not be visited upon appellant, Salamone. The government improperly "created its own group," *Barber v. Ponte*, 772 F.2d 982, 1000 (1st Cir.1985) (in banc), and the trial court, without justification, excluded all members of that group from Salamone's jury. To require appellant to adduce *proof* of what *could* have happened puts the defendant in the predicament referred to in *Peters* of providing proof that "is virtually impossible to adduce." This leaves the defendant without an effective remedy for improper conduct in the selection process and provides incentive for such conduct to recur. Accordingly, we conclude that the wholesale, arbitrary and irrational exclusion of jurors with affiliations with the NRA from Salamone's jury is presumptively prejudicial.

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[15] In this regard Judge Stapleton's concurrence is not at odds with our approach. *See* Concurring Opinion typescript at 1. We reach the harmless error issue here without mandating its application and conclude that the wholesale, arbitrary exclusion of a class of jurors from appellant's panel, the resulting harm to the integrity of the judicial system and the expanded use of the peremptory challenges by the prosecution together are sufficiently prejudicial to require a new trial. As acknowledged in the concurrence, "here ... there is the *appearance* of the prosecution, with the assistance of the court, attempting to 'stack the deck' against the defendant." Concurring Opinion typescript at 1232. We find that such conduct is presumptively prejudicial and thus constitutes a real harm to the defendant.

[16] *Peters* involved a claim by a white defendant that the systematic and arbitrary exclusion of blacks from his grand and petit juries deprived him of due process of law.

The government nevertheless contends that the Supreme Court's decision in *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984) suggests that most errors in jury selection procedures will be subject to harmless error analysis. In *Hobby*, the Court considered whether the statistical underrepresentation of blacks and women in the post of jury foreman over a seven year period in violation of the fifth amendment required the reversal of the conviction of petitioner, a white male. The Court concluded that reversal was not required. In reaching its conclusion, however, the Court, distinguishing *Peters, supra*, observed that none of the due process interests of the defendant were threatened by discrimination in the selection of grand jury foremen. In particular, the Court noted that the "societal value in assuring diversity of representation on grand and petit juries," 104 S.Ct. at 3096, was not implicated as long as the grand jury "*as a whole* serves the representational due process values expressed in *Peters*." *Id.* at 3097 (emphasis in the original). Because the duties assigned to the jury foreman are "ministerial," the Court concluded that discrimination in the appointment to that post does not "impugn[ ] the fundamental fairness of the process itself so as to undermine the integrity of the indictment." *Id.* Nothing in *Hobby* suggests that the nature of the injury alleged here constitutes or is governed by harmless error.

Perhaps more instructive is current Supreme Court precedent on the improper exclusion in a capital case of jurors who qualify under the test enunciated in *Witherspoon*. In a brief *per curiam* decision the Court in *Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 399, 50 L.Ed.2d 339 (1976) held that "[u]nless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." (Citations omitted.)[17] Strict application of the reasoning of *Davis* to the instant appeal indicates that reversal is appropriate.

[11] Nor does application of the harmless error doctrine alter this result. From our review of the record we cannot conclude that the error involved in the instant appeal was harmless. Salamone challenges

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[17] On February 24, 1986 the Supreme Court granted certiorari in *Gray v. Mississippi*, 472 So.2d 409 (Miss.1985). *See* — U.S. —, 106 S.Ct. 1182, 89 L.Ed.2d 299 (1986). The question presented by *Gray* is

> was petitioner's right to fair and impartial jury violated in this capital murder trial by trial court's excusing for cause of potential juror who was clearly qualified to be seated under *Adams v. Texas* and *Wainwright v. Witt*?

54 U.S.L.W. 3591 (U.S. March 4, 1986). Thus, the Court is essentially requested to reconsider *Davis* and determine whether the erroneous exclusion of a juror in a death penalty case may be harmless error.

In *Gray*, after refusing to dismiss several jurors who stated unequivocally that they could never vote for the death penalty believing them to be attempting to avoid jury duty, the state court sustained a prosecution challenge for cause of a juror who met the standards of impartiality enunciated in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) and *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The state supreme court held that the defendant was not prejudiced by the court's dismissal of the qualified juror after the prosecution had exhausted its peremptory challenges due to the earlier refusal of the judge to dismiss those prospective jurors who stated that they could never apply the death penalty.

the summary exclusion of *seven* prospective jurors solely on the basis of their affiliation—no matter how attenuated—with the NRA. While we recognize that appellant has no right to a jury of "the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on," *McCree*, 106 S.Ct. at 1767, he is entitled to a jury from which none of those, or any other group, has been summarily excluded without regard to their ability to serve as jurors in the particular case. *See id.* at 1765. "The [consequent] injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181 (1946). Moreover, appellant suffered an even more tangible harm. As noted by Justice Rehnquist in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984), "Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenges for cause may assist parties in exercising their peremptory challenges." Freed of the burden of substantiating its challenges for cause, the government in the instant appeal was thereby afforded a broader exercise of its peremptory challenges. Unlike the situation in *McCree* where the Court rejected the argument that the "absence of '*Witherspoon*-excudables' 'slanted' the jury in favor of conviction," 106 S.Ct. at 1767, we cannot conclude with confidence that the *improper* exclusion of the prospective jurors in this case, in conjunction with the expanded use of the peremptory challenges afforded to the government, produced an impartial jury. Nor are we convinced that the representation of gun owners on Salamone's petit jury resolves the issue. *Cf. Turner v. Murray*, — U.S. —, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (notwithstanding fact that jury impaneled consisted of eight whites and four blacks, rights of black capital defendant accused of murdering white man were violated where trial judge failed on *voir dire* to question prospective jurors on racial prejudice). *Defensive* possession of weapons by the average citizen is hardly a clear indication of neutrality on the issue of gun control.[18] In sum, we find that the inadequate *voir dire* by the trial court set into motion a series of events, all of which had an incalculable, prejudicial effect on appellant's right to a fair trial by an impartial jury. Thus, we conclude that the erroneous exclusion of prospective jurors with NRA affiliations was not harmless and appellant's judgment of conviction cannot stand.

CONCLUSION

For the foregoing reasons, the judgment of the district court will be reversed, and the case remanded for proceedings consistent with this opinion.

STAPLETON, Circuit Judge, concurring:

The court's opinion persuasively demonstrates that the district court abused its discretion when it systematically excluded members of the National Rifle Association from Salamone's petit jury with no record basis for concluding that they would be unable to perform the duties of a juror.[1] I also find myself in agreement with the court's conclusion that a new trial is required. Our views differ only in that I am unable to find that Salamone has shown actual prejudice. I reach the same result, however, because I conclude that a showing of actual prejudice is not required in a situation of this kind.

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[18] We do not mean to suggest that any of the individual jurors impaneled in appellant's case were excusable for cause on the ground of actual bias. Rather, we find that the expanded use of prosecutorial peremptory challenge necessarily afforded the government a greater opportunity to impanel a jury biased in its favor.

[1] Like the majority, I do not reach the issue of whether there has been a Fifth Amendment due process violation.

Just as the record in this case is devoid of any basis for excluding NRA members, it is similarly devoid of any evidence which would support a finding that those in fact chosen were anything other than impartial, conscientious, law-abiding citizens who reached a conclusion consistent with the law and the facts of the case. "[E]xactly the same twelve individuals could have ended up on his jury through the 'luck of the draw' ", and Salamone clearly would have no complaint. *Lockhart v. McCree*, — U.S. —— 106 S.Ct. 1758, 1767, 90 L.Ed.2d 137 (1986). Accordingly, I cannot subscribe to the suggestion that Salamone's jury has been shown to have been "stacked" against him. *See Witherspoon v. Illinois*, 391 U.S. 510, 523, 88 S.Ct. 1770, 1778, 20 L.Ed.2d 776 (1968). Nor can I agree that the freeing of government peremptory challenges is sufficient prejudice to require a new trial. Every error of exclusion for cause by a trial judge frees a peremptory challenge for someone and the general rule has been that such errors do not require reversal when those actually chosen as jurors have been qualified through the voir dire process. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555–556, 104 S.Ct. 845, 849–50, 78 L.Ed.2d 663 (1984) (finding that "it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process" and holding that to obtain a new trial, "a party must first demonstrate that a juror failed to answer honestly a question on *voir dire*, and then further show that a correct resp would have provided a valid basis for a challenge for cause."); *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982) ("[D]ue process does not require a trial every time a juror has been placed in a potentially compromising situation.... The safeguards of juror impartiality, such as *voir dire* ..., are not infallible."); *King v. State*, 287 Md. 530, 414 A.2d 909, 913 (Md.1980) (quoting *Blumenthal & Bickart v. May Co.*, 126 Md. 277, 96 A. 434, 438 (Md.1915)): "The authorities support the proposition that it is not reversible error for the Court of its own motion to exclude a juror, even for insufficient cause, if an unobjectionable jury is afterwards obtained."); *State v. Mathis*, 52 N.J. 238, 245 A.2d 20, 27 (N.J.1968), *rev'd on other grounds sub nom. Mathis v. New Jersey*, 403 U.S. 946, 91 S.Ct. 2277, 29 L.Ed.2d 855, *reh. denied*, 404 U.S. 876, 92 S.Ct. 31, 30 L.Ed.2d 125 (1971).

It is, of course, not surprising that Salamone has not shown that his jury acted differently than would one chosen without the arbitrary exclusions. As the court observes, such a showing is virtually impossible to make. That fact alone counsels against imposing a requirement that actual prejudice be shown. But more importantly, our society's interest in maintaining confidence in the integrity of its criminal justice system mandates that the process in this case be repeated. *See King*, 414 A.2d at 913, ("Although this [*Blumenthal & Bickart*] principle may be applicable in cases where the reason for excusing a juror is related to that particular juror, it is inapplicable when an entire class holding a certain belief is excluded."); *Mathis*, 245 A.2d at 27 ("That [*Blumenthal & Bickart*] rule is sound enough when the focus is merely upon a defendant's entitlement to a *particular juror* ... But when the challenge goes beyond that limited issue and implicates the right to be tried by a jury which is *representative* of the community, it would be no answer to a systematic exclusion to say that the 12 jurors who decided the case were *individually* impartial.") (emphasis in original).

As the court correctly notes, the Supreme Court held in *McCree*, 106 S.Ct. at 1764, that the constitutional requirement of a "representative cross-section of the community" is inapplicable in a case where the exclusion of jurors from a petit jury is at issue. The fair cross-section cases, accordingly, do not aid Salamone in establishing that the district court erred. Nevertheless, the values at stake in those cases are also implicated here and should be taken into account in deciding whether there is to be a remedy.

The alternative holding of *McCree* is that the exclusion of *Witherspoon*-excludables (i.e. those whose views regarding capital punishment are such as to prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath) would not violate the fair cross-section requirement even if it were applicable to petit juries. In the course of reaching this conclusion, the Court distinguished McCree's situation from those involved in the cross-section cases on a basis which also distinguishes this case from *McCree.* The Court emphasized that the jurors excluded from McCree's jury had been reliably found to be unable to faithfully perform their duties as jurors. Here, as in the cases where the cross-section requirement has been found to have been violated, there is no record basis for finding that the excluded jurors were similarly disabled. Accordingly, unlike the exclusion in *McCree,* the exclusion in Salamone's case was a class exclusion wholly unrelated to the capacity of the members of the class to serve as jurors in his case.

The alternative holding of *McCree* was based on the Court's view that the exclusion of jurors who were not able to perform their assigned tasks did not contravene any of the purposes of the fair cross-section requirement. Quoting from *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the court identified those purposes as:

> (1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility." Id., 419 U.S., at 530–531, 95 S.Ct., at 697–98.

The *McCree* Court went on to distinguish the previously decided cases in which there had been arbitrary class exclusions of blacks, women, and Mexican Americans:

> Because these groups were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the commonsense judgment of the community. In addition, the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness." Finally, such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.

Because the "group of *Witherspoon*-excludables" "is carefully designed to serve the state's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both ... phases of the capital trial," the *McCree* Court found "very little danger" that capital case juries would be arbitrarily skewed. 106 S.Ct. at 1766. Moreover, "because the group of '*Witherspoon*-excludables' includes only those who cannot and will not conscientiously obey the law with respect to issues in a capital case, 'death qualification' hardly can be said to create an 'appearance of unfairness'." 106 S.Ct. at 1766. Finally, according to the *McCree* Court:

> ... the removal for cause of "*Witherspoon*-excludables" in capital cases does not prevent them from serving as jurors in other criminal cases, and thus leads to no substantial deprivation of their basic rights of citizenship. They are treated no differently than any juror who expresses the view that he would be unable to follow the law in a particular case.

106 S.Ct. at 1766.

The *McCree* Court summarized its holding as follows:

> In sum, "*Witherspoon*-excludables," or for that matter any other group defined solely in terms of shared attitudes *that render members of the group unable to serve as jurors in a particular case,* may be excluded from jury service without contravening any of the basic

> objectives of the fair cross-section requirement.

106 S.Ct. at 1766 (Emphasis supplied).

The *McCree* Court noted in the course of its analysis that the groups excluded from juries in the fair cross-section cases have "immutable characteristics" and that this distinguishes them from *Witherspoon*-excludables. This also distinguishes members of the National Rifle Association from blacks, women, and Mexican Americans. Nevertheless, in the context of the *McCree* Court's analysis, the meaningful distinction is between arbitrary class exclusions and exclusions based on a determination that the excluded group cannot perform as jurors.

The arbitrary exclusion of citizens based solely on their association in a group like the NRA, poses a threat to the interests protected by the fair cross-section requirement similar to that posed by the exclusion of blacks, women, and Mexican Americans. Because the effects of arbitrary class exclusions based on shared views or associations are impossible to predict and "arbitrary skewing" cannot be ruled out, such exclusions necessarily undermine the confidence of the defendant and the public in the fairness of the process. Moreover, here as in the fair cross-section cases, there is the *appearance* of the prosecution, with the assistance of the court, attempting to "stack the deck" against the defendant. Finally, discrimination in jury selection against a group associated in part for the purpose of influencing political action in which members have a common interest is no more acceptable than similar discrimination which offends other constitutionally protected values.

I make these observations not to suggest that Salamone was entitled to a petit jury representing a fair cross-section of his community, but rather because the interests protected by the fair cross-section requirement have heretofore been considered of sufficient importance to our society that violations have mandated reversals without reference to whether the particular defendant has been able to demonstrate actual prejudice. *Taylor*, 419 U.S. at 532, 95 S.Ct. at 698 (quoting *Ballard v. U.S.*, 329 U.S. 187, 193, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946)): ("To insulate the courtroom from either [men or women] may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded."); *Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976) (per curiam) (" ... [I]f a venireman is improperly excluded, even though not ... [irrevocably] committed [to vote against the death penalty], any subsequently imposed death penalty cannot stand."). *See also Batson v. Kentucky*, — U.S. —, 106 S.Ct. 1712, 1718, 90 L.Ed.2d 69 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.")

For these reasons, we cannot afford to allow Salamone's conviction to stand as a final product of our criminal justice system.

QUESTIONS AND ANSWERS

Question 1. Mr. Greenhalgh and Mr. Best, judges have traditionally deferred to counsel during voir dire examinations because of counsel's initimate familiarity with the details of the case. The 1977 study published by the Federal Judicial Center indicates that this practice has been moving swiftly to where judges now have the major role in voir dire examinations.

What effect do you feel that this is having on the selection of fair and impartial juries?

Answer. In our opinion, the rapidly evolving practice of Federal judges playing a dominate role in voir dire examination will have an adverse effect on the selection of fair and impartial juries. It is well known that the venire are much more hesitant, and thus reluctant, to answer questions posed by a judicial officer, who presents such an authoritarian figure. Secondly, only counsel, on account of their intimate knowledge in the trial preparation of the case, can fairly probe for bias and prejudice.

Question 2. Mr. Greenhalgh and Mr. Best, you state in your prepared testimony that the present jury selection practices in the federal courts are "inefficient, ineffective and prejudicial."

Could you please be more specific and explain why you reached this conclusion?

Answer. Our answer to question 1 generally covers this question. Since trial counsel have labored long and hard in the trial preparation of the case, the court's active participation to the exclusion of the counsel contributes to inefficiency of adjudicative resources. It is ineffective again because it renders almost useless trial counsel's trial preparation, who seeks an active voir dire examination. It is prejudicial again because it excludes trial counsel's participation.

QUESTIONS POSED BY SENATOR GRASSLEY

Question 3. Mr. Greenhalgh, in your view, is attorney-conducted voir dire constitutionally required?

Answer. In our view, attorney-conducted voir is constitutionally required. *Powell* v. *Alabama* stands for the fundamental proposition that the assistance of counsel is required at any critical stage of a criminal trial proceeding. Jury selection is certainly within this concept of ordered liberty. The right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the tradition of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments. *Herring* v. *New York,* 422 U.S. 853, 857 (1975). The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process. Id. at 858. It is counsel's right to participate fully and fairly in voir dire examination, not the court's.

Question 4. Mr. Greenhalgh, you stated in your testimony that the purpose of voir dire is "to probe deeply"; others have stated that lawyers should use voir dire to "plant the seed of their theory".

How is this consistent with the Supreme Court's recent statement that "[T]he process is to ensure a fair and impartial jury, not a favorable one"?

Answer. In order to ensure a fair and impartial jury, counsel must probe deeply to uncover bias and prejudice. Any restriction upon the right of counsel to participate in voir dire examination places counsel in an unfavorable position, which has constitutional implications. This is a restriction on the right of the effective assistance of counsel, not the impartial jury clause of the Sixth Amendment. In this instance the latter must give way to the former. Otherwise, it interferes with the basis right of a court to make his defense.

Senator HEFLIN. Mr. Miller.

STATEMENT OF MARION D. MILLER

Mr. MILLER. Mr. Chairman, I appreciate the opportunity to be here on behalf of the National Association of Criminal Defense Lawyers. I am a criminal defense practitioner, have been for about 20 years, and I lecture on criminal defense matters for bar associations in practical areas.

This legislation is critical. Every study of which I have knowledge from any organization shows that the judge is more likely to discover that a juror is not fair and is not qualified when the attorneys conduct the voir dire than when the judge does it.

I have talked with judges about this, particularly with newer judges, and they find it amazing when they get on the bench early on in their careers the rapport that the jury develops with them and the significance of their role as the neutral arbiter.

In the New York Second Circuit Court of Appeals study which I mentioned in my prepared statement, the judges found that the lawyers were better able to probe because they did not have to bring with them the baggage of that important function of a court, which is the neutrality, and as an advocate they could probe.

Judges will often ask, for example, in a case that involves media attention, Did you read anything? Yes. Will it affect your ability to be fair? No. I will refer you to an interview that occurred by the National Jury Project of a similar situation where the juror was then asked by the attorneys, as opposed to the court, Well, what did you read?

The witness, who was the juror, testified, Well, you know, we all know what she has done. We read it in the newspaper. She went in and robbed the bank and a policeman was killed.

Now, those were probing questions. That testimony occurred after three pages of interview, not after three questions. As for the time-consuming problem that the Justice Department raised, it should be noted that the second circuit study found in the majority of cases that it was either not more time consuming or that the time involved was not that great.

So I would ask the committee to consider the fact that more people are excused for cause when the lawyers do voir dire than when the judges do it. That is a fairer result. The study from the second circuit did show that there is not that great a time expansion and in some cases it expedited jury selection.

If the judges in that study found that they were able to get more fair juries and have a better trial as a result, and if most States have been doing this for years, there is a great deal of salutary effect that can be achieved in justice by making this change.

The horror stories out of California, which is a dear State and in my family is a dear State for some of my relatives—I hope they do not think I speak ill, but there are aberrations in some of the ways they do some of their cases and it is not the national norm.

In most State courts, you can select a jury in a few hours. Courts control. The Justice Department is wrong. This legislation will not give the defense control. It will give the defense and the prosecutors participation.

A final point, if I might, is that five out of six times when the prosecutors discovered that they were achieving rapport with the jury by their voir dire, they made favorable reports on the process in the second circuit study. So when they thought they were getting rapport, they liked it.

Thank you.

[Submissions of Mr. Miller follow:]

SUMMARY OF TESTIMONY OF MARVIN D. MILLER
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. Chairman and distinguished members of the Subcommittee, I am pleased to appear this morning to present testimony on behalf of the National Association of Criminal Defense Lawyers in support of S. 953, to amend Federal Rule of Criminal Procedure 24(a) with respect to the examination of prospective jurors.

My name is Marvin D. Miller, and I have been engaged in the private practice of criminal defense law for the past 17 years. Although my offices are located in Alexandria, Virginia, I have tried criminal cases in both state and federal courts in every state from Maine to Florida. I am a Past President of the Virginia College of Criminal Defense Attorneys, and have lectured widely before bar associations on criminal defense issues.

I note for the Subcommittee's information that NACDL has testified in support of similar legislation before this Subcommittee on two previous occasions--through statements of our then-President John Ackerman on March 7, 1984, and our then-Legislative Committee Chairman, John Cleary, on November 16, 1981, both before the Senate Judiciary Subcommittee on Courts.

NACDL strongly supports the key reform in S. 954--that is, requiring (rather than simply permitting, as is the case under current Rule 24(a)) a court to afford the parties, upon request, at least a minimal opportunity to conduct their own voir dire of the prospective jury. It is our view that attorney-conducted voir dire is the best way to ferret out information relating to potential juror bias. The attorneys, by virtue of their necessary extensive preparation for trial, have an understanding of the evidence and the issues involved which is inevitably more detailed and comprehensive than that of the trial judge. Their total immersion in the case puts them in the optimum position to perceive the issues and frame the questions that will most quickly and directly uncover problems with jurors' impartiality.

The more such information the court has, the more likely is an impartial and unbiased jury. And the selection of an impartial and unbiased jury advances the goal of a fair trial-- an overarching purpose shared in equal measure by the defense the prosecution, the court, and society itself.

I would call the Subcommittee's attention to a study conducted in the Second Circuit on the effects of attorney-conducted voir dire, entitled "Report of the Committee on Juries of the Judicial Council of the Second Circuit, August 1984." That report examined a series of experiments conducted by district court judges in that circuit, and found that, statistically, the greatest number of successful challenges for cause occur where there is attorney-conducted voir dire. And, of course, the judicial granting of challenges for cause is a compelling manifestation of the successful rooting out of juror bias. The study found that most district court judges favor attorney-conducted voir dire, because it gives them the greatest amount of information upon which to exercise their power to strike jurors for cause.

We would also suggest that this same salutary effect on the eliciting of information regarding possible bias permits more intelligent and effective use of peremptory challenges as well.

It is our view that attorneys openly acting as advocates for one side or the other are better able to conduct questioning designed to uncover bias than are judges, who are constrained to appear scrupulously unbiased and neutral in their examination of potential jurors. And at the same time, any risk of abuse by overzealous attorneys can easily be controlled by the judge.

Mr. Chairman, we appreciate the opportunity to present our views on this important legislation, and we commend your strong leadership on these issues. We urge the Subcommittee to act promptly to approve S. 954 and send it to the full Committee for action before the August recess.

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August 19, 1987

The Honorable Howell Heflin
Chairman
Subcommittee on Courts &
Administrative Practice
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: S. 953 and S. 954

Dear Senator Heflin:

I am writing in response to the questions propounded by you and Senator Grassley regarding my testimony. Please accept my sincere apologies for being two days late in replying to your letter. I was out of the area for some time and have only today been able to spend time in my office. I regret not being able to conform to your schedule and hope that my submission will still be of some use to you in your laudable efforts to provide greater fairness in the voir dire process.

The 1984 study by the 2nd Circuit Judicial Council examined direct attorney participation in voir dire and individual questioning of panelists after a general voir dire in the robing room, out of the presence of other panelists and the public but in the presence of the Court, counsel and court reporter.

The guidelines for the study suggested time limits in single party cases to be set by the Court. In multi-party cases the time allotted to counsel for each party was set either by the Judge or by agreement of the parties. The experiment recommended a ten minute time limit in single party cases; however, some judges allowed more and some judges allowed less.

There were eight instances in which the respondents commented specifically on the length of time this procedure required. Six of the eight reported that there was no delay in the voir dire or that the experimental procedure actually expedited voir dire. The remaining respondents only found a slight delay.

It should be noted that in the summary observations of the report, the Judicial Council indicated that the claimed potential for abuse by counsel in attorney conducted voir dire "can be--and were--prevented by proper judicial oversight". The report went on to state that if the Court informs the party of the guidelines prior to voir dire and acts quickly to restrain offending attorneys, the Court effectively prevents and circumscribes improper use of attorney conducted voir dire.

I regret that I cannot give you an accurate observation of the average time allotted for attorney conducted voir dire. It is important to note, however, that a majority of the participating judges were pleased with the experiment. Some thought that the reason the attorneys were better able to bring out juror bias than were the judges was that the attorneys were freer to be more persistent with a juror and could pose some questions which a judge, given his neutral role, could not pose.

If there is opposition to your proposal perhaps a study in several federal jurisdictions would be beneficial. An informal survey I conducted among lawyers from various states who are members of the National Association of Criminal Defense Lawyers indicated that attorney conducted voir dire in state courts generally results in a jury being selected within an hour or two.

Thank you very much for your attention and please accept my apologies for my tardiness. If I or the National Association of Criminial Defense Attorneys can provide any other information, please advise.

Sincerely,

MARVIN D. MILLER

Senator **Heflin**. You mentioned the *Donovan* case. I suppose that is where the juror turned out to be incompetent. Did they select the jury with the mandatory no-lawyer participation?

Mr. **Greenhalgh**. My understanding is New York procedure requires it.

Senator **Heflin**. That they have mandatory——

Mr. **Greenhalgh**. Yes, sir.

Senator **Heflin**. No participation by the——

Mr. **Greenhalgh**. No, no. They have mandatory voir dire. In other words, counsel must be permitted to ask questions of the panel.

Senator **Heflin**. Well, somehow or other, they did not ascertain whether she was competent or not.

Mr. **Best**. Well, as I understand the situation, it was a 38-week trial and the juror stressed out during the beginning of jury deliberation.

Senator **Heflin**. All right. Well, thank you. We will probably submit some written questions that we would like for you to answer.

Our next witness is Judge Thomas A. Wiseman, chief judge of the U.S. District Court, Middle District of Tennessee. Judge Wiseman, it is nice to see you again.

STATEMENT OF THOMAS A. WISEMAN, JR., CHIEF JUDGE, U.S. DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE

Judge **Wiseman**. Mr. Chairman, I do appreciate the opportunity to appear before you today. I have submitted my written testimony and, if it is appropriate, I will ask that that be included in the record, then address briefly one of the points that I make in my testimony, and then submit myself to questions.

The preceding witnesses have discussed my first point, and that is that I think lawyers are more competent to do voir dire than are judges. You will forgive me. Being from Tennessee, we do not speak a lot of old French down there, and so if I lapse into the vernacular and say voir dire, which is what it is called in Tennessee, you will forgive my parochialism.

I do concur with the lawyer witnesses who have appeared before the committee that I think lawyers are far more competent to do this. Judges will not take the time, Mr. Chairman, to study the issues of a case, to study the nuances of a case, to frame the order in which questions are presented, and to make the followup questions which are suggested by either body movements or eye movements or other forms of communication that may escape the notice of the judge because he is really not familiar with the case.

The second point I made in my testimony is that I think the legislation is absolutely necessary because the great majority of my colleagues are not going to permit lawyer voir dire unless they are required to do so by the rules.

The final point that I make is that I really think the paranoia about how much additional time this is going to take is not well founded. I have been on the bench for 9 years. I was a practicing lawyer and a trial lawyer for a good, long while before that time, except for a brief political sabbatical which wound up unsuccessful.

But I always get a jury by the morning break in a routine case, Mr. Chairman. I start court at 9 o'clock and we will swear the jury. I will do a brief voir dire in which I determine facial qualifications, introduce the parties, determine that nobody knows anything about this case or has ever been represented by the parties.

I turn it over to the lawyers for voir dire and we always have a jury by 10:30. Now, in an unusual case, however, it could go a couple of days, and that is appropriate that it should if it is a case of great notoriety and has been in the papers a lot, and the jury should be examined more carefully.

I do not think it would take any additional time, as the studies have shown. Furthermore, I think it will reduce the number of appeals. If the lawyers have conducted the voir dire themselves and they have failed to ask a question, that is their problem. It is not something that the judge overlooked.

As I say, I have been on the bench 9 years. I have never been appealed on a voir dire and I have always let lawyers do the voir dire. In a criminal case, I usually do a little more. I will go further in the facial questioning and give some explanation to determine that the jury has no argument with or problem with the principles of presumption of innocence or refusal of the defendant to testify and that sort of thing; just find out that the jury is facially qualified and then allow the lawyers to ask.

I think it is good legislation, Mr. Chairman. I think it is necessary legislation. I think your bill, as you have drafted it, is a good compromise between those who would perhaps advocate the California system and those who want to retain the status quo.

Senator HEFLIN. Do you think the time limitations are reasonable in regard to the bill?

Judge WISEMAN. Yes, sir. As I understand your bill, a minimum of 30 minutes would be allowed. I would venture a guess that very few lawyers will use the full 30 minutes. I never cut a lawyer off. If he is not repeating himself or me, if he is not being obsequious and trying to fawn with the jury or trying to argue his case in his voir dire, I never cut him off. As long as he is on a roll, I let him go.

As someone mentioned earlier about control, if a lawyer begins to get out of hand, all you have to do is just call him up to the bench and say, Mr. So-and-So, you are about to wear out your welcome and cut it off pretty quickly. He will do it. I never had any problem with it, Mr. Chairman.

Senator HEFLIN. Well, thank you, Judge. We appreciate your testimony.

Judge WISEMAN. Yes, sir. Thank you for the opportunity to appear before you.

[Submissions of Judge Wiseman follow:]

STATEMENT OF

THOMAS A. WISEMAN, JR.
CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Mr. Chairman and Members of the Committee:

My name is Thomas A. Wiseman, Jr., and I am Chief Judge of the United States District Court, Middle District of Tennessee. I have served as a Federal Judge for the last nine years and, before that, with the exception of two years in the Army and a four-year political sabbatical, was a practicing lawyer with an extensive litigation practice after graduation from Vanderbilt Law School in 1954.

I appear before you today in enthusiastic support of Senate Bills S.953 and S.954 which would mandate lawyer participation in jury voir dire in both civil and criminal trials. I recognize that, in doing so, my views run counter to those of the Judicial Conference of the United States and, very probably, to those held by a majority of Federal Judges. I am also a Vice-President and Board Member of the Federal Judges Association, and I wish to make clear at the outset that the views I express are my own and do not represent a position taken by the F.J.A.

In my years as a trial lawyer before many different judges, State and Federal, I was always permitted to conduct voir dire. In the nine years I have been on the bench, I have always permitted lawyer voir dire. I speak, therefore, from my own experience which is heavily biased in favor of this legislation. I now will attempt briefly to address the reasons why I think this legislation is salutary, and also try to refute those arguments I have heard advanced against it.

LAWYERS ARE MORE COMPETENT TO CONDUCT VOIR DIRE THAN IS THE JUDGE.

The function of voir dire is at least twofold. First, the inquiry is directed at discovering bias, prejudice, preconception or predisposition of the prospective juror. These jurors become the subject of challenge for cause. Second, the inquiry explores for more subtle mindsets, past experiences, habits, and thought processes that furnish a rational basis for exercise of peremptory challenges.

Communication occurs on many levels. A lawyer should be given the opportunity to observe facial, eye, and body signals that occur during the questioning. This cannot take place if the judge does it all. The necessity of a follow-up question may only be apparent to one sensitive to the juror's reaction to the preceding question.

Any lawyer worth his salt will give long and serious thought to framing his voir dire questions. Judges do not have, and will not take, the time to give this kind of thought to the subtleties of language and expression that might shape the formulation or the order of questions to a jury panel. The lawyers are far more familiar with the facts, the potential areas of juror predisposition to a theory, to a witness, or to a line of questioning than the judge can possibly be.

There is also something intimidating about a question from a judge that is not nearly so when it comes from a lawyer. The lawyer is far more likely to get a candid admission than is the black-robed person looking down on the juror.

Opponents of lawyer voir dire argue that a third function will dominate such an inquiry. They suggest that the questioning lawyer will be searching for bias in his favor, that the end of the exercise will be to select a favorable rather than a fair jury. They further argue that lawyers will spend voir dire time in planting the seed of their theory and establishing rapport with the jury. Some of this can and should go on—it is part of the adversary process and our whole system is based upon the premise that truth is refined in the crucible of the adversary process.

A good trial lawyer is conscious of his impression on a jury from the time he walks in the courthouse; and everything he does is calculated to "build rapport" and to plant and nurture his theory. Here again, a trial judge in control can recognize obsequious fawning and put a stop to it. There is also an obvious difference between a question designed to explore for the presence of predisposition toward a theory, and one which is merely argumentative. Jurors are not dummies, either. Most are blessed with more common sense and perception than we give them credit for, and they resent excesses in voir dire of whatever nature. Good lawyers know this and govern themselves accordingly.

THE LEGISLATION IS NECESSARY BECAUSE THE MAJORITY OF FEDERAL JUDGES WILL NOT ALLOW LAWYER VOIR DIRE UNDER THE PERMISSIVE PROVISIONS OF THE PRESENT RULES.

The House of Delegates of the American Bar Association has recommended legislation of the type now before you in 1975, 1976, and 1981. The ABA has testified favorably to legislation on several occasions in the past. The Association of Trial Lawyers of America and the National Association of Criminal Defense Lawyers have also endorsed the need for such legislation.

The Judicial Conference defends the status quo with the assertion that present Rules 24(a) of Federal Rules of Criminal Procedure and 47(a) of Federal Rules of Civil

Procedure give the trial court discretion to allow counsel participation in voir dire "in appropriate cases."

The problem is that too many federal judges never find that appropriate case. A study in 1970 found that 117 out of 219 judges surveyed conducted the entire voir dire examination themselves, only sometimes supplementing their own questions with those submitted by counsel. A second study in 1977 showed 77 percent of 420 responding judges permitted no direct attorney participation in civil proceedings, and 73 percent permitted none in criminal jury selection.

Consistent and persistent denial of an available option is not the exercise of discretion; it is rejection of the option that amounts to a judicial restatement of the rules. Because the majority of the federal judiciary has turned a deaf ear to the request of the responsible bar, congressional removal of the judicial discretion is necessary. Had the judiciary truly exercised the discretion conferred by the existing rules, I doubt that the controversy would exist.

THE LEGISLATION WILL DECREASE RATHER THAN INCREASE JUDICIAL WORKLOAD AND WILL NOT UNDULY LENGTHEN TRIAL TIME.

As suggested earlier, a good voir dire requires as much thought and preparation as a good cross-examination. I doubt if many judges put this kind of time and thought into their judge-conducted voir dire. Under the system of lawyer voir dire, this is rendered unnecessary—the lawyer prepares this part of his case just as he does the remainder of it.

Fewer appeals will result. If the lawyer has the opportunity to voir dire, he cannot complain about the judges' conduct of questioning, or the failure to ask certain questions.

The legislation specifically restricts the time allowed unless extended in the discretion of the judge. In a 1977 study by the Judicial Conference, in civil cases with lawyer oral participation, voir dire averaged 44 minutes and 36 minutes without such participation. In criminal cases, voir dire with lawyer participation averaged 52 minutes and only 51 without.

My own experience corroborates this study. I normally open court at 9:00 a.m. and take a 15 minute comfort recess at 10:30 a.m. In the routine case, I always have a jury sworn by the recess and am ready for opening statements immediately after the recess. In the unusual case, longer voir dire is both necessary and proper. I begin by introducing the parties and counsel, determine if anyone on the panel has any prior knowledge of the facts, or has any acquaintanceship or relationship to the parties or lawyers, and then let the lawyers inquire. In a criminal case, I follow the same procedure but go further with an explanation of reasonable doubt, presumption of innocence, effect of defendant's election not to testify, the lack of any inference to be drawn from indictment, etc. These initial inquiries by the court determine facial qualification and then the panel is turned over to the lawyers for more in-depth inquiry.

In conclusion, Mr. Chairman, I consider this legislation to be a salutary development in Federal trial procedure. Voir dire is an integral part of litigation. Lawyers have a function in this as much as in any other part of the trial. Given the opportunity, most lawyers perform adequately. Judges should let a lawyer be the lawyer and accept our role as referee in a jury trial, as difficult as that may be for those of us who came from a professional lifetime as a combatant.

I have previously urged my colleagues on the Federal Bench to consider the possibility that we may be wrong—that our brothers and sisters at the bar are also conscientiously concerned about the effective functioning of the system—that when the responsible, organized, national bar repeatedly advocates change, we should reconsider our position and explore the possibility of a workable compromise. I believe S.953 and S.954 represent just such a workable and reasonable compromise.

I shall now be happy to answer any questions the Committee may wish to ask.

* * *

QUESTIONS AND ANSWERS

1. Judge Wiseman, I appreciate you sharing with us your experiences during voir dire. As I read your testimony, it takes you approximately one and one-half hours to select a jury for most trials.

Is that correct? How is that time divided between the general guidance you provide, any questions you might have, and questions by counsel? Does counsel usually take more than one hour in routine cases? Do you set time limits for counsel, or do they pretty much govern themselves? Finally, have you had any reversals based upon errors committed during voir dire as a result of participation by counsel?

1. Yes, it is correct that I generally select a jury in one and one-half hours or less. On the normal civil case I will spend about 15 minutes introducing counsel and the parties and determining that none of the jurors has any personal relationship with

them. I then tell the jury something about the facts of the case and the contentions of the parties, as this appears from the pleadings, as a basis to ask the jury if they have any prior knowledge of the case from whatever source. I may then read the list of witnesses to see if any of them are acquaintances or relatives of jurors. I will also ask sensitive questions that may have been requested by counsel to be asked by me. At that point I turn the panel over to the lawyers. I spend closer to 30 minutes in a criminal case before letting the lawyers inquire.

I do not put a limit on the lawyers, but it is extremely rare for either side to take more than 30 minutes.

I have never had a reversal on jury selection for any reason.

2. Judge George of California and Mr. Whitley of the Justice Department both refer to some of the more appalling cases where jury selection has taken an inordinate amount of time because of unlimited participation by counsel in the process. One took a record-breaking nine months to select a jury for a murder trial. From everything you have said Judge Wiseman, it appears to me that you allow counsel considerable latitude during voir dire.

What is the longest amount of time you have spent on any one case in selecting the jury?

2. The longest amount of time spent in jury selection was about 3-1/2 days (27 trial hours). This was a criminal case involving a conspiracy by the KKK to bomb the Jewish Temple. It had received great attention and notoriety from the media. We had individual voir dire of each panel member out of the presence of the rest of the venire on the questions of prior knowledge, predispositions, Klan membership, etc. The second longest jury selection I have experienced was two days (14-1/2 trial hours). This, again, was a notorious case involving contractor bid-rigging. Here, we also had individual voir dire out of the presence of the remainder of the prospective jurors. I did not consider either of these cases to be excessive in the time spent to assure a fair jury. The unusual nature of each fully justified the additional time and inquiry.

In my nine years on the bench, I have probably had three or four other cases that have consumed an entire day to two days for jury selection, but there was good reason for it in each case.

3. Judge Wiseman, your testimony seems to reflect the opinion that voir dire is more appropriately a function of counsel than of the judge's because of the combatant nature of the task.

Could you please elaborate on this? Based upon your experience as both a lawyer and a judge, what do you believe the appropriate role of the judge should be?

3. I do believe voir dire is more appropriately the function of counsel than the court, but my reason for this view is not solely based upon the adversarial posture of counsel.

First, I believe counsel are better able to frame appropriate questions and are more likely to elicit candid responses. Selection of the areas to be explored, framing the questions, organizing the order of the questions, deciding when a follow-up question is needed are matters of technique and judgment that require preparation and pretrial thought. No judge is going to devote the time and hard work this exercise entails. Counsel know the facts and nuances of a case which cannot be known to the judge. Furthermore, jurors are intimidated by the black robe. In my experience I have frequently seen a juror give a response to a lawyer's question that constituted ground for challenge for cause, when that same juror had remained silent, had not raised his hand, to a general question on the same subject that I had previously asked to the entire panel.

Second, the lawyer is entitled to find out who is trying his case, both for the purpose of intelligently exercising peremptory challenges, and also for shaping his advocacy. For example, a little old lady wearing Reebok's, who drives a Volvo, reads the New Republic, and has a bumper sticker reading "Save the Whales," will give a skilled advocate a pretty good idea how that person thinks and whether or not he wants her on this particular case. Not many judges will explore these areas.

Finally, jury selection is just as much a part of the adversarial process as any other part of the trial. I see no greater reason for the judge to conduct voir dire in order to insure selection of a "fair" jury, then there is for a judge to conduct cross-examination of a witness in order to insure a "just result." The adversary process has its shortcomings. However, the experience of several hundred years in this country and in England has proved that truth is indeed refined in this traditional crucible. In a jury trial, the role of the judge is that of referee. Conduct of voir dire exclusively by the judge is incompatible with this referee function.

Senator **Heflin**. Next we have witnesses from the Administrative Office of U.S. Courts: Judge William Terrell Hodges, chief judge, U.S. District Court for the Middle District of Florida, and Judge Ronald M. George, Superior Court of California, Los Angeles County.

STATEMENT OF WILLIAM TERRELL HODGES, CHIEF JUDGE, U.S. DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, AND RONALD M. GEORGE, JUDGE, SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR LOS ANGELES COUNTY, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Judge **Hodges**. Good morning, Mr. Chairman. I appear this morning to express strong opposition, with great respect, in behalf of the Judicial Conference of the United States and its committee on the operation of the jury system, of which I have been a member for the past 5 years.

We oppose the amendments of the rules for six reasons. First of all, I would emphasize that under the present rules lawyers are not precluded from participating in voir dire examination. In fact, the rules require that the judge shall supplement his or her examination of the jury by pursuing lines of examination suggested by counsel.

It is required by the rule, and if the rule is abused, as, quite frankly, it may be on some occasions, the courts of appeals have demonstrated a ready ability to correct those mistakes.

Second, we suggest that there is no demonstrated need for this change in the rules. There is no study or suggestion anywhere of which I am aware that the juries presently being selected to administer justice in the U.S. district courts are any less impartial than those which are being seated in the State courts.

In point of fact, lawyers declare in many instances that they prefer to litigate in the U.S. district courts and have always opposed, for example, elimination of diversity jurisdiction. They bring their litigation to Federal courts where juries are selected fairly and impartially, we suggest, under the rules as they presently exist.

Third, the proposed amendments to the rule would introduce, I think admittedly from what you have heard from these other gentlemen this morning, the adversarial system into the voir dire process of examining jurors.

It is the obligation of the system, as you have declared in your statements and as we all agree, to provide to the litigants in both civil and criminal cases fair and impartial juries.

Lawyers who are participating in the voir dire examination as advocates have a dual purpose. To be sure, they are endeavoring to expose latent bias for the purpose of exercising challenges both for cause and peremptorily, but they are also, I suggest, always attempting to indoctrinate the jury in order that the jury, once selected, is preconditioned to a particular claim or defense.

If a lawyer does any less than that when being permitted to participate in voir dire, we all know that that lawyer has failed in his obligation to his client. Indoctrination is not a proper function of voir dire examination, in our view.

Fourth, and I think this is a vital point, these rules would increase the field of litigation, especially in criminal cases. It is easy to say that a trial judge should be able to control what is going on in the courtroom. To be sure, all of us do our best to control our courtrooms and see that justice is fairly administered.

But the first time that a judge, particularly in a criminal case, I suggest, respectfully, interrupts counsel in the conduct of voir dire examination and there is a subsequent conviction, then there will be a claim on appeal that the voir dire examination was unfairly curtailed by the trial judge.

I would also point out, particularly, again, in criminal cases, that the field of review of the courts of appeals is always one-directional in the criminal process; that is to say, the courts of appeals will only see those cases for review, given the jeopardy clause, in which the defendant or defendants have been found guilty by the jury, with the result being that the developing jurisprudence in this area will always, I suggest, be in one direction, which reduces ultimately the control of the judge in the conduct of the voir dire.

My colleague, Judge George, will speak, I am sure, to that as he expresses the experience in the California courts which function under similar rules to those that would be proposed here.

Fifth, we suggest that the judge has an obligation, which is difficult to discharge if lawyers are conducting the voir dire, to protect our jurors from harassing questions, embarrassment, and even abuse in some cases.

Our jurors, after all, come to the district courts as citizens to participate in the administration of justice and we owe them an obligation to prevent them from being cross-examined with respect to matters that have only marginal relevance to their ability to serve as fair and impartial jurors in administering justice in the court.

Finally, sixth and lastly, we do suggest that the introduction of this new voir dire procedure would hamper the ability of the courts, particularly in the Federal system in outlying divisional offices—when a judge travels, let us say, to a place which is not manned by a resident judge—to select several juries to try a calendar of civil cases.

A new technique developed over the last decade or so that is being followed in many courts, known as contiguous or multiple voir dire, involves mass examination of the panel as a whole, and the presence of all of the lawyers involved in the first four or five cases, followed by contiguous exercise of challenges in selecting the juries for those cases. This is a great technique in terms of legitimately saving time and expense in jury selection in those circumstances. We see that this new procedure might make it more difficult, if not impossible, to pursue those techniques.

We are all interested in the fair administration of justice. I would be the first to concede that there are some of my colleagues who conduct unduly perfunctory voir dire examinations. Were that not so, we would probably not be here this morning.

But I suggest that the cure for that lies either in the court of appeals or in better orientation and educational efforts directed toward new district judges with respect to the vital importance of conducting thoroughgoing voir dire examination, which is being undertaken by the Federal Judicial Center.

I would conclude, Senator, by saying that there is a great oracle of wisdom in the eleventh circuit known to you, not to me, Mr. "No Tie" Hawkins, who might well say, "If it ain't broke, don't fix it."

[Submissions of Chief Judge Hodges follow:]

Executive Summary

The Judicial Conference of the United States, pursuant to the recommendation of its Committee on the Operation of the Jury System, continues to oppose in the strongest possible terms legislation such as S. 953 and S. 954. These bills would amend the Federal Rules of Civil and Criminal Procedure to require, rather than merely permit, counsel to conduct oral examinations of prospective jurors.

The primary arguments in favor of the proposed amendments are that they will make voir dire more meaningful and better ensure selection of an impartial jury. But existing practice is highly effective in these respects, and sufficiently flexible to allow direct oral examination by counsel where it is deemed appropriate. Thus, the case simply has not been made that the current jury selection process operates unfairly or otherwise needs revision.

Since current practice now permits what the proposed amendments would require, the principal effect of the amendments will be to remove the courts' discretion over the conduct of voir dire. This is likely to produce several unfortunate consequences:

- attorneys will strive to convert voir dire into a search for partial rather than impartial jurors;
- voir dire will take on the characteristics of a "mini trial" as attorneys use their examination time to advocate their cases, offer instructions on the law, and otherwise influence or indoctrinate prospective jurors;
- prospective jurors will be more readily exposed to abusive, unfair and unnecessary questioning, and may lose respect for the institutions of law;
- the conduct of voir dire will consume more time, even in routine cases, thus contributing to court backlogs and delays in the administration of justice; and
- experimentation with jury pools and other streamlining methods will be chilled, if not eliminated entirely.

Experience in state courts confirms the problems that can result from mandatory attorney questioning. Perhaps as a result, many states are considering moving toward a system like the Federal one, which effectively and fairly balances the competing interests of the Judiciary and the bar. No purpose would be served by ignoring the lessons of the states and replacing a fair and flexible practice with a rigid, problem-plagued alternative.

Mr. Chairman and Members of the Subcommittee:

As a member of the Judicial Conference Committee on the Operation of the Jury System, I am pleased to have this opportunity to present the views of the Federal Judiciary on S. 953 and S. 954. With all due respect, we strongly oppose this legislation. The Judiciary believes that these bills offer a solution to a problem that simply does not exist, and, worse, that they are likely to create new problems interfering with the court's ability to provide justice that is swift as well as sure. Joining me today is the Honorable Ronald M. George, Judge of the Superior Court of the State of California for Los Angeles County, who will testify about state court experience with attorney-conducted voir dire similar to that envisioned by these bills, which he believes has created problems the federal courts should avoid rather than imitate.

S. 953 and S. 954 would amend Federal Rule of Civil Procedure 47(a) and Federal Rule of Criminal Procedure 24(a), respectively, to provide parties and their attorneys in the federal courts an absolute right to conduct a minimum of 30 minutes' oral examination of prospective jurors. This is a dramatic departure from current practice, in which district judges have discretion to conduct voir dire examinations themselves, to pose questions submitted by the parties, or to allow the attorneys to conduct examinations directly.

Hearings were held on this subject in 1981 and 1984, and on both occasions the Judiciary expressed its opposition to the proposed amendments. The materials submitted on those occasions, including testimony in 1984 by my colleagues Judges William B. Enright and T. Emmet Clarie, contain persuasive discussions of the Judiciary's concerns and fully support our steadfast opposition to the proposals. 1/ I commend those materials to you. Although I will not repeat the entirety of our prior submissions, I appreciate the opportunity to reiterate the Judiciary's long-standing position—stemming from decades of experience with a system that works and works well—in favor of retaining the practice presently embodied in Rules 47 and 24 and against adoption of the instant proposals.

Federal Voir Dire Practice

The practice of voir dire in the federal courts has developed over the years but

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1/ See Hearings on S. 386 and S. 677 Before the Subcomm. on Courts of the Comm. on the Judiciary, 98th Cong., 2d Sess. (1984) (Statement of Honorable T. Emmet Clarie, United States District Judge for the District of Connecticut); id. (Statement of Honorable William B. Enright, United States District Judge for the Southern District of California); Hearings on S. 1529, S. 1531, and S. 1532 Before the Subcomm. on Courts of the Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (Special Printing of Judicial Conference of the United States Comments Concerning Court Reform Legislation).

has maintained the constant goal of ensuring litigants a fair trial before an impartial jury. Jurors are examined for three fundamental reasons:

(1) to determine whether statutory qualifications are met;

(2) to determine the existence of actual bias or prejudice as a basis for excusing jurors for cause; and

(3) to allow an informed basis for the exercise of peremptory challenges against those jurors thought likely to be hostile. 2/

Voir dire does not exist so that litigants may select jurors favorable to their cause, and the examination process is not intended to be the first round in the adversarial battle. As one commentator phrased it, "no litigant is entitled to a jury of his liking. He is only entitled to an impartial jury." 3/

The process by which juries are selected has varied over the course of our history. In 1895, the Supreme Court set down basic standards for questioning prospective jurors that acknowledged the wide discretion trial judges enjoy in the conduct of voir dire:

> [A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases. 4/

The practice of judge-conducted voir dire has been widespread in the federal courts since at least the beginning of this century. 5/ That practice was institutionalized through the adoption of federal rules placing responsibility for voir dire in the district courts. Rule

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2/ See 8A J. Moore, Federal Practice ¶24.02, 24.04 (2d ed. 1987).

3/ Nordbye, Comments on Selected Provisions of the New Minnesota Rules, 36 Minn. L. Rev. 672, 681 (1952).

4/ Connors v. U.S., 158 U.S. 408, 413 (1895).

5/ See Moore, Voir Dire Examination of Jurors II, the Federal Practice, 17 Geo. L.J. 13 (1928).

47 of the Federal Rules of Civil Procedure was first promulgated in 1938, and Rule 24 of the Federal Rules of Criminal Procedure was first promulgated in 1946.

Since the promulgation of these rules, the Judiciary has continued to monitor jury voir dire practices and to consider proposals for change. Each review has led our committees to conclude that no changes to the rules themselves are necessary. The Judicial Conference continues to recommend that district judges conduct the voir dire examination under ordinary circumstances, that judges supplement the examination with appropriate questions from counsel, and that judges consider permitting direct questioning of the jury panel by counsel in appropriate cases. Like the rules on which they are based, these recommendations contain sufficient flexibility to allow each litigant time for direct questioning, as the current proposals would mandate, but they preserve for the courts the discretion to regulate the conduct of voir dire so as to keep it within its proper bounds.

The most recent comprehensive study of federal voir dire practice, completed in 1977, demonstrates that there exists no single, uniform federal approach to voir dire.[6] Instead, judges exercise their discretion to allow for differing forms and levels of participation by counsel as individual circumstances warrant. In typical civil and criminal cases, the vast majority of district judges allow the attorneys to participate in jury questioning either directly, through their own oral examination, or indirectly, through the submission of questions. Only one to two percent of judges refuse both direct and indirect attorney participation in typical cases, while over 20 percent permit direct attorney questioning and another 68 to 73 percent accept and ask questions posed by counsel. The study does not provide data on the conduct of voir dire in atypical cases, such as those involving extensive pretrial publicity or notoriety, but it is fair to assume that judges exercise their discretion to allow counsel an even larger role in cases where they can demonstrate that there is a special need to probe more deeply. Thus, counsel play a significant role in questioning prospective jurors in most federal courtrooms.

Current Federal Practice Fully Serves the Interests of Justice

Changes in the current federal voir dire practice may be warranted only if some deficiency or problem exists. Accordingly, this Subcommittee should focus on a single preliminary question: does the federal voir dire system fully serve the interests of justice by assuring litigants selection of an impartial jury? The Judiciary firmly believes that it does, and that there is therefore no need to amend the applicable federal rules.

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[6] See G. Bermant, Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges (Federal Judicial Center 1977).

As I noted above, voir dire has three fundamental purposes all of which can be—and are routinely—met when judges take the lead in examining prospective jurors. The first purpose, to ensure that jurors meet statutory qualifications, is met by posing standard questions about jurors' citizenship, age, residency, and so forth. 7/ In many cases, statutory qualifications can be determined by reviewing responses to juror questionnaire forms. 8/

Current federal practice also fully achieves the second purpose of voir dire: determining whether jurors harbor any actual bias or prejudice that warrants excusal for cause. Challenges for cause are allowed in those instances where "threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror." 9/ As with jurors' statutory qualifications, the existence of bias or prejudice is easily demonstrable if the right questions are asked. And as with statutory qualifications, the issue is not who asks the questions, but whether the right questions are asked.

Adequate voir dire on the issue of juror bias or prejudice is achieved through a number of different approaches permitted under the existing federal rules. In reviewing this aspect of voir dire practice, appellate courts look to see whether the method adopted by the trial court was capable of giving "reasonable assurance that prejudice would be discovered if present." 10/ If the procedure is not adequate in this respect, or if the court fails to pose (or allow counsel to pose) questions designed to elicit bias or prejudice where there is reason to believe it may exist, or if relevant questioning is allowed but confined too narrowly, or in short if the road taken doesn't get to the destination, then the appropriate remedy in the federal courts is disregard of the verdict and provision of a new trial. 11/

7/ *See* 28 U.S.C. § 1865 (1982).

8/ *See* 28 U.S.C. § 1869(h) (1982).

9/ *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981).

10/ *U.S. v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). *See also U.S. v. Magana-Arevalo*, 639 F.2d 226, 229 (5th Cir. 1981); *U.S. v. Gerald*, 624 F.2d 1291, 1296 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

11/ *See Feitzer v. Ford*, 622 F.2d 281 (7th Cir. 1980); *U.S. v. Shavers*, 615 F.2d 266 (5th Cir. 1980); *cf. Ham v. South Carolina*, 409 U.S. 524 (1973).

Reversals for this reason are not common, of course, since district courts are quite conscientious in meeting the standards for proper voir dire. But the appellate courts have not shirked from sending cases back to be retried where the voir dire that was conducted was not "reasonably sufficient to test jurors for bias or partiality." 12/ Thus, new trials have been ordered where the trial court refused to allow questioning about possible racial prejudice, 13/ and about prejudice stemming from the defendant's alleged ties to the Communist party. 14/ Similarly, cases have been remanded for retrial where the district court improperly restricted questioning about jurors' involvement in any automotive accidents like the one that was the subject of the trial 15/ and about jurors' experience as victims of any crime like the one to be tried. 16/ The availability of reversal as a remedy for inadequate exploration of juror bias and prejudice, together with the development of federal standards in the case law and court practice guidelines, thus ensure that litigants can exercise any challenges for cause fully and fairly.

Obtaining a basis for exercising peremptory challenges is the third objective of jury voir dire. The Supreme Court has termed peremptory challenges "a necessary part of trial by jury." 17/ They serve "to remove jurors who, in the opinion of counsel, have unacknowledged or unconscious bias" that may not be easily demonstrable. 18/

Current federal practice recognizes the importance of peremptory challenges and provides ample opportunity for litigants to exercise their challenges in a meaningful fashion. As noted above, courts must conduct searching examinations of possible juror bias or prejudice that could warrant challenges for cause. Whether or not these examinations actually lead to challenges for cause, they clearly provide a wealth of information about prospective jurors that can amply assist counsel in the exercise of peremptory challenges. In addition, the 1977 study of federal voir dire indicated that all but a small minority of district judges either ask questions submitted to them by counsel, or permit direct counsel examination of prospective jurors, when conducting voir dire in

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12/ U.S. v. Toomey, 764 F.2d 678, 682 (9th Cir. 1985), cert. denied, 106 S.Ct. 828 (1986), citing U.S. v. Baldwin, 607 F.2d 1295, 1297 (9th Cir. 1979).

13/ U.S. v. Bear Runner, 502 F.2d 908 (8th Cir. 1974); U.S. v. Robinson, 485 F.2d 1157 (3d Cir. 1973).

14/ Morford v. U.S., 339 U.S. 258 (1950).

15/ Feitzer v. Ford, 622 F.2d 281 (7th Cir. 1980).

16/ U.S. v. Shavers, 615 F.2d 266 (5th Cir. 1980).

17/ Swain v. Alabama, 380 U.S. 202, 219 (1965).

18/ Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981).

typical civil and criminal cases. This means that the subjects litigants seek to explore as a basis for exercising peremptory challenges are almost always raised during voir dire. On the whole, then, counsel are able to obtain sufficient information about prospective jurors to afford a valid basis for exercising peremptory challenges under existing rules and procedures.

The primary argument in favor of legislation such as S. 953 and S. 954 is, nevertheless, that a guaranteed right to direct examination of jurors is needed to enable counsel to use their peremptory challenges more effectively. The arguments advanced by many proponents could lead one to believe that attorneys are somehow precluded altogether from the jury selection process under the existing rules. This just is not so. Rules 47 and 24 both explicitly provide, in virtually identical language, that if the judge conducts the voir dire examination, "the court shall permit ... attorneys to supplement the examination ... or shall itself submit to the prospective jurors such additional questions of the ... attorneys as it deems proper."

It is true that the majority of judges exercise their discretion to pose and phrase voir dire questions as they see fit. Proponents of change object to this approach. They argue that attorneys are more familiar with cases than judges and that they can better phrase questions and pose follow-up question sequences. Reduced to its essentials, this is an argument of form and not substance. It suggests that Congress should fundamentally alter control of voir dire in the federal courts so that attorneys can be guaranteed the right to ask questions in their own words and in their chosen order. However, a right to any such procedural guarantee has not been established, nor is it needed in addition to the substantive guarantees of the federal system that satisfy every legitimate purpose of voir dire and meet all legal and constitutional requirements. In the absence of a compelling need, the rules should not be amended.

The Proposed Amendments Would Do More Harm Than Good

Even if one accepts that current federal practice in conducting voir dire fully serves the interests of justice, it is fair to ask whether the practice could be improved. There is no doubt that it could, and for this reason the Judicial Conference has recommended that district courts consider using different approaches to conducting voir dire, including allowing direct oral examination by attorneys of the sort envisioned by S. 953 and S. 954. The Judiciary fully intends to continue its efforts to improve the efficiency and effectiveness of the jury selection process within the broad framework of the existing rules.

While improvements can continue to be made in some areas, the fact is these proposed bills are not the way to do it. Indeed, instead of solving a perceived problem (which I do not in any event believe exists), these bills are likely to create significant new problems. They are likely to convert voir dire into a search for partial rather than impartial jurors; to give voir dire the features of a "mini trial" as attorneys get a jump on the adversary process; to expose jurors to more abusive and unnecessary questioning; to increase the time voir dire consumes even in routine cases; and to restrict experimentation with jury pools and other methods of streamlining jury selection.

Beyond any doubt, providing attorneys with a right to question jury panels will convert at least that portion of the voir dire into a search for partial rather than impartial jurors. Although none of the advocates of these amendments has said so in so many words, the search for sympathetic jurors is clearly a major goal of the proposals. Judges do not share this goal, since this is not a proper purpose of voir dire, and so attorneys hope to carve out for themselves the time and freedom to bend voir dire to this task.

Judges have primary responsibility for selecting a fair and impartial jury, and they will retain this responsibility under the proposed rule amendments. This means that under the proposed amendments litigants will be able to rely on judges to question jurors about common areas of prejudice and obvious points of sensitivity in a case. The litigants will then be free in their 30 minutes of questioning to pose questions that can only be characterized as designed to find jurors partial to their side. If that is not obvious on its face, a review of the materials used in trial advocacy seminars to teach lawyers how to conduct voir dire confirms the point.

To see what this means in practice, one needs only to look at some of the questions litigants have tried to raise in recent cases. For example, attorneys defending a union official sought to ask prospective jurors whether they had ever crossed a picket line. 19/ Counsel in a case involving prosecution of a gambling offense wanted to know which prospective jurors bet on sporting events or bingo games. 20/ In other criminal cases, the defense attorneys hoped to determine whether any members of the jury panels

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19/ U.S. v. Hoffa, 367 F.2d 698, 710 (7th Cir. 1966), vacated on other grounds, 387 U.S. 231 (1967).

20/ U.S. v. Smaldone, 485 F.2d 1333, 1347 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

would "hold out" for acquittal 21/ or whether they had served on other juries that convicted anyone. 22/ Attorneys in recent drug prosecutions wanted to explore how the prospective jurors felt about drugs and drug laws, and whether they would be willing to turn in a relative for using marijuana. 23/ And in cases where defendants were Spanish-speaking or Mexican-Americans, counselors posed questions about jurors' Mexican ancestry and fluency in Spanish. 24/ These sorts of questions have little if anything to do with exploring prospective jurors' bias or prejudice and everything to do with finding those who are pro-union, pro-gambling, pro-drug legalization, pro-defense, or otherwise partial to a party in interest.

A second likely result of mandating attorney participation in voir dire is that attorneys will use their time to advocate their cases, to offer instructions on the law, and otherwise to influence or indoctrinate prospective jurors. Experienced advocates know that the most important part of a trial is at the beginning, for a juror's first impressions are likely to be the longest-lasting ones. Thus, lawyers may be expected to view voir dire as a new opportunity for advocacy at a time when jurors are probably most susceptible of being influenced. The opportunity to sway jurors toward their case at ever-earlier stages of litigation is an obvious goal of the proposed amendments, but, like the goal of finding partial jurors, it has remained unstated because it is not a proper purpose of voir dire.

The means by which attorneys can use voir dire to advocate their cases are limited only by their creativity, which is not a very substantial limitation. For example, defense attorneys frequently seek to explain, through "questioning," that a defendant is presumed innocent until proven guilty, that the government has the burden of proof in a criminal case, and that a defendant must be found guilty beyond a reasonable doubt. 25/ Of course, these are all standard instructions delivered by judges once or more during trials, but attorneys like to emphasize them early and often and to phrase them in the

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21/ U.S. v. Gillette, 383 F.2d 843, 849 (2d Cir. 1967).

22/ U.S. v. Gordon, 634 F.2d 639, 641 (1st Cir. 1980).

23/ U.S. v. Brunty, 701 F.2d 1375, 1379 (11th Cir.), cert. denied, 464 U.S. 848 (1983). See also U.S. v. Toomey, 764 F.2d 679, 682 (9th Cir. 1985).

24/ U.S. v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978); U.S. v. Gonzales-Benitez, 537 F.2d 1051, 1053 (9th Cir.), cert. denied, 429 U.S. 923 (1976).

25/ U.S. v. Miller, 758 F.2d 570, 573 (11th Cir.), cert. denied, 106 S.Ct. 406 (1985); U.S. v. Cosby, 529 F.2d 143, 147 (8th Cir.), cert. denied, 426 U.S. 935 (1976); Grandsinger v. U.S., 332 F.2d 80, 81 (10th Cir. 1964).

most self-serving fashion. Instructions on substantive areas of the law, like self-defense,_26/ conspiracy,_27/ entrapment,_28/ and the defendant's right not to testify_29/ are also common topics for questioning in cases where attorneys intend to raise them (and even, sometimes, where they don't). Such instructions should appropriately come from the judge—not from attorneys during voir dire questioning.

Questions aimed at identifying biased jurors—which is generally a proper subject of inquiry—can also be used by attorneys determined to advocate their cases to create a favorable impression with the jury. For example, questions can be phrased to evoke sympathy or respect, as in a case where counsel sought to ask about possible prejudice against the defendant, who was described as "a decorated combat infantry veteran" and a "certified Republican presidential candidate."_30/ Similarly, it would not be difficult for counsel to phrase questions to subtly implant derogatory information about the opposing party. Current practice allows judges to limit these self-serving, adversarial approaches and to keep voir dire within appropriate bounds.

I do not mean to imply that any of the above questions are necessarily improper, or that a judge would commit error by allowing them to be asked. It is precisely because these questions are probably not legally improper that I raise them. Proponents of S. 953 and S. 954 argue that judges will continue to exercise control over voir dire and thus can prevent abuses by attorneys, but this is an empty assertion with respect to the types of attorney practices described above. So long as questions are not improperly prejudicial or inflammatory, and so long as counsel have a right to question for at least 30 minutes, courts will have a difficult time exercising control. How can a judge object to cumulative, repetitious, or irrelevant questions when counsel are entitled to examine the jury for a full 30 minutes? The proposed rule amendments will thus allow counsel to use voir dire for a variety of improper, adversarial purposes, so long as the questions themselves are not improper.

I also have doubts that many improper questions raised during attorney voir dire can be controlled effectively by the courts. Certainly the judges' task will be more difficult if they lose the discretion to require counsel to submit proposed questions

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_26/ U.S. v. Robinson, 475 F.2d 376, 380 (D.C. Cir. 1973).

_27/ U.S. v. Kershman, 555 F.2d 198, 202 (8th Cir.), cert. denied, 434 U.S. 892 (1977).

_28/ U.S. v. Crawford, 444 F.2d 1404, 1405 (10th Cir.), cert. denied, 404 U.S. 855 (1971).

_29/ U.S. v. Clarke, 468 F.2d 890, 891 (5th Cir. 1972).

_30/ U.S. v. Gordon, 634 F.2d 639, 641 (1st Cir. 1980).

before they are asked. Moreover, improper questions that expose prospective jurors to prejudicial information or otherwise wrongly influence them do their damage as soon as they are spoken. Preventing counsel from obtaining answers to such questions, or reprimanding counsel for asking them, are the only available forms of judicial control that can be used in these situations, and they come too late to avert damage.

Another likely result of mandatory attorney questioning is more juror exposure to abusive, unfair and unnecessary questioning. Oral examination by lawyers is bound to be performed with the same zeal that is brought to any other litigation activity. Some examinations, as a result, will be sharply pointed if not hostile. Others will follow the course described above, with endless repetitions and restatements of standard instructions on the law. Still others will have lawyers probing into personal matters that to most jurors will not seem fair or relevant.

Using recent case experience as a guide, attorneys can be expected to explore such issues as what magazines and newspapers jurors subscribe to; what recent books they have read; what their educational backgrounds are; what churches, social clubs or fraternities they belong to; whether they speak Spanish; and whether they harbor racial prejudices where race or alienage is not an issue in the case. 31/ Jurors may rightly be offended by all of these inquiries. Certainly most will consider them burdensome and tedious, not to mention unnecessary, and many could lose respect for the institutions of law that subject them to this sort of scrutiny. Worse, prospective jurors could feel threatened or harrassed by personal questions. In the wrong setting, even asking where jurors live may present an implicit threat that is not necessarily cured if jurors are relieved of answering specifically. 32/

Jurors appear involuntarily in our courts in response to a summons, and they render an important—indeed an indispensable—public service. At the very least, we owe them protection from improper and abusive questioning. The courts will lose much of their ability to provide that protection if we give attorneys free rein to conduct voir dire in federal courtrooms.

Finally, adoption of the proposed rule amendments embodied in S. 953 and S. 954

31/ U.S. v. Bosby, 675 F.2d 1174, 1184 (11th Cir. 1982); U.S. v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978); U.S. v. McDowell, 539 F.2d 435, 436 (5th Cir. 1976); U.S. v. Gonzales-Benitez, 537 F.2d 1051, 1053 (9th Cir.), cert. denied, 429 U.S. 923 (1976).

32/ U. S. v. Barnes, 604 F.2d 121, 140-41 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); U.S. v. Gibbons, 602 F.2d 1044, 1050 (2d Cir.), cert. denied, 444 U.S. 950 (1979).

will have unfortunate administrative consequences. I will not review here the studies and statistics on the length of voir dire examinations in different jurisdictions, since our prior submissions in 1981 and 1984 contain lengthy discussions of that issue. It is safe to say, however, that state court systems that mandate attorney participation in voir dire experience extremely protracted examinations that are virtually unknown in the federal courts.

The instant proposal, of course, seeks only to add between one and two hours to the voir dire process. This alone will more than double the time spent on a typical voir dire, with attendant costs in the courts' time and money. More importantly, these proposals appear to be merely the first step in efforts by the bar to gain control over the voir dire process. As the representative of the National Association of Criminal Defense Lawyers stated in testimony before this Subcommittee in 1984, the "limitation to 30 minutes should be for the simplest of trials and should increase in accordance with the increasing complexity of the case." 33/ This, I submit, is a blueprint for building into the federal system the sorts of extended examinations, costs, and delays that the state courts contend with on a daily basis.

Additional time and money are not the only administrative costs these amendments will engender. They will also undermine the Judiciary's efforts to promote the efficient and speedy administration of justice. The Judicial Conference for many years has been working to promote the most effective use of time in court proceedings, and especially jury proceedings. The strictures imposed by mandatory attorney voir dire will certainly chill, if not eliminate entirely, this effort. For example, the courts have experimented with multiple voir dire, in which juries are empanelled for as many as 15 to 20 cases in one session. This approach tremendously speeds up the examination and selection of jurors, since large numbers of prospective jurors can be questioned at the same time. But it is hard to envision how the courts can retain these efficiencies in a system that accords attorneys an absolute right to direct questioning. Removing trial judges' authority to control the voir dire examination will thus substantially hamper their ability to experiment with innovative new ways to streamline voir dire.

33/ See Hearings on S. 386 and S. 677 Before the Subcomm. on Courts of the Comm. on the Judiciary, 98th Cong., 2d Sess. (1984) (Statement of John E. Ackerman of the National Association of Criminal Defense Lawyers).

Conclusion

Proponents of the proposed rule amendments simply have not made a case that problems exist warranting changes in federal voir dire practice because, I submit, there is not a case to be made. Current federal voir dire practice fully serves every legitimate purpose of voir dire, and does so efficiently and fairly, as it has for decades. Current practice is also sufficiently flexible that it allows for precisely the kind of direct attorney questioning S. 953 and S. 954 would mandate.

The experience of many state courts stands in stark contrast to the smooth and efficient operation of federal voir dire. States that mandate attorney participation in voir dire suffer lengthy delays in questioning, and many as a result are viewing the federal system with some interest. We should not ignore their experience by adopting a practice that will lead down the same troubled road.

The Judiciary fully intends to continue efforts to improve jury voir dire practice. Unfortunately, the instant proposals would not be improvements at all. They would create new problems for judges and jurors alike. S. 953 and S. 954 are, in effect, special interest legislation for certain attorneys, disguised as judicial reform. The Judicial Conference of the United States strongly opposes their enactment.

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QUESTIONS AND ANSWERS

Question No. 1. In your prepared statement you state that the judiciary is seeking to improve the current system of voir dire. What problems do you see with the current system and what remedies do you believe would be effective in correcting them?

> Response. The only problem I see with the current system is the undeniable fact that some district judges are conducting somewhat perfunctory voir dire examinations while also curtailing the right of counsel to supplement the Court's examination. If this were not so, I believe there would be little or no agitation for change. I suggest, however, that while this problem admittedly exists, the remedy of amending the rules would constitute an "overkill" creating other problems of much more serious consequences for the system as a whole. There are two other intermediate remedies, both of which are already available and in use: (1) appellate review of abuse of judicial discretion; and (2) better orientation and training of newly appointed district judges regarding the vital importance of a thorough and comprehensive voir dire examination tailored to the issues of the particular case.

Question No. 2. You state that the Judicial Conference has recommended that district courts consider using different approaches to conducting voir dire, including allowing direct oral examination by attorneys of the sort envisioned by S.953 and S.954. You further state that the Judiciary fully intends to continue its efforts to improve the efficiency and effectiveness of the jury selection process within the framework of the existing rules. Could you explain how you envision such effectiveness being implemented under the existing framework?

> Response. The Judicial Conference and its Committee on the Operation of the Jury System have over the past several years recommended that district courts consider different approaches to conducting voir dire including direct questioning by attorneys. To carry out this recommendation the Jury Committee has reviewed voir dire training materials compiled by the Federal Judicial Center for use in orientation programs and has worked with the Center to focus judicial attention upon the need for better and more thorough voir dire examinations. In addition (as stated in my answer to Question No. 1), the judiciary is continuing its recent efforts to better orient and train newly appointed district judges concerning judicial skills in conducting voir dire examination. The Committee specifically recommended that training materials include discussion of the importance of thorough voir dire examinations whether conducted by the Court or the attorneys. I have every hope that these efforts will bear fruit and that the current problems associated with voir dire will be resolved over time.

Senator HEFLIN. Judge?

STATEMENT OF RONALD M. GEORGE

Judge GEORGE. Mr. Chairman, I am Ronald George. I have 15 years' experience as a trial judge in the State courts of California and recently had a term as president of the California Judges Association and supervised the criminal division of our Los Angeles Superior Court.

I am here at the request of the Judicial Conference of the United States supporting their position in opposition, respectfully, to the passage of these bills. I will be brief and try to highlight the positions set forth in the written statement I filed with the committee.

I am here basically to share with you the California experience with lawyer-conducted voir dire. It is often said that one of the strengths of our Federal system is that our 50 States constitute 50 social laboratories to test various theories and practice. I would submit to you that lawyer-conducted voir dire has been tested in the California laboratory and has failed the test miserably.

This bill would basically establish a procedure similar to the California system. It would allow only reasonable voir dire. There would be purported discretion on the part of the trial judge.

However, when you look at what appellate courts do in this area, I think you realize that the appellate courts basically give lip service to the concept of discretion on the part of the trial judge, but end up narrowly interpreting that discretion and broadly interpreting the right of the attorneys to conduct their voir dire.

I respectfully disagree with Judge Wiseman and feel, on the contrary, that appeals will be increased rather than decreased if you switch to the system proposed in this legislation.

I also feel that lawyers will use up the full amount of time and that judges will be reluctant to not go beyond the so-called minimum of 30 minutes. The point that Federal judges are able to control their voir dire, as Judge Wiseman is, is a reflection of the fact that, of course, the Federal judge now has the authority to curtail or totally terminate the voir dire.

When he does not have that right any more under this legislation, if that were to pass, then I submit the Federal experience would more closely parallel the California experience.

To give you a few graphic illustrations: we had a homicide conviction reversed by an appellate court after an otherwise flawless trial because the trial lawyers' questioning was restricted—the trial judge finally said he had enough. He said, I will not let you ask why you think there are so few members of a particular racial minority in professional golf or professional tennis.

The fellow wanted to do that to elicit some thoughts that would enable him to exercise his peremptory challenges. The trial judge said no. The appellate court reversed for that reason. That is an illustration.

I had the dubious distinction of presiding over what is supposed to be the longest criminal trial in American jurisprudence, the Hillside Strangler case—2 years and 2 days. I was disturbed to be congratulated by some of my judicial colleagues at taking "only" 54 days to pick the jury under our California system.

We have had other cases where jury selection has taken weeks and months, and it routinely does in capital cases. The worst example I can give you is of what I hate to call a garden variety murder case, but it was one defendant charged with one count of murder. It took 9½ months just to pick the jury.

We can imagine all those civil and criminal cases that stood in line and other cases that could have been tried in the time that we were spinning our wheels just selecting a jury in that case, and I should mention at the cost of half a million dollars, because it costs about $3,000 to $4,000 a day to keep a criminal courtroom in operation in our State courts, and I am sure there are substantial costs in the Federal system as well, considering all of the overhead. In fact, other cases had to be shifted to distant districts because this case tied up the court.

Sometimes people say, well, do not focus on just those high-publicity and capital cases; they are not typical. But they are in two senses. First of all, one or two of them can clog up the whole system. Second, the same thing happens less dramatically in the thousands of garden variety cases.

If it takes 3 days instead of 2 days, as it does in California to try a misdemeanor case, because 1 day is spent on voir dire instead of 1 hour, when you accumulate that with 200,000 cases pending in California for trial, that has disastrous effects.

Compare, if you will, what happens in the Federal courts. In the John Hinckley case involving the attempt on President Reagan's life, a jury was selected in less than a week, and yet one cannot imagine a result more favorable from the standpoint of the defendant.

In the well-publicized *Ginny Foat* case in the State courts of Louisiana, it took a very short time for the judge to pick the jury. The defendant was acquitted. So there is no monopoly on due process in California that we have by way of our jury selection process. If you do it under the Federal system, you are going to have a fair outcome, also.

I am surprised that some of the earlier speakers would bring up the Michael Deaver trial that is underway now because although the judge erred in excluding the press, apparently, the estimate is that it would take 4 to 5 days to pick a jury in a case of that notoriety, going through approximately 100 prospective jurors, from what I read in the paper, for a several-week trial. In California, in the State courts, and I submit under the Federal system if this legislation were to pass, it would take weeks and weeks to pick a jury in a case of that type.

Now, let me just address briefly a couple of other matters, if I may—the limitation, specifically, in this legislation of 30 minutes. I would submit to you that that does not take care of the problem. I think that is a well-intentioned effort to try to balance the various considerations, but I have cited in my written statement an appellate decision, People versus Hernandez, where the appellate courts held that a 30-minute limitation was arbitrary, and held that it was error for the trial judge to impose that kind of limitation.

It is difficult to straight-jacket a case into a 30-minute limitation. You may have very complex legal issues in one case that do not exist in another case. Therefore, that limitation may not be appropriate from case to case.

You may have differences in the type of jurors you get. You may get some jurors who have some experiences that would require more in-depth questioning than others. So I think it is very difficult to impose a specific limitation.

There are studies which are quoted in my written statement, one by the University of Southern California Law Review, an 80-page study that indicates that there would be fairness and substantial cost savings by switching to the Federal system in the California courts.

I have also appended to my statement the New York study. There was legislation in California and in New York to change to the Federal system. It did not get any place, but that is the effort.

I would conclude by saying that although this is a well-intentioned proposal, I think, in effect, it is a step backward and that the reform movement, ironically, holds up the present Federal system as a model, and that increasingly States are switching to the Federal model.

I would be pleased to answer any questions if there are any, Mr. Chairman.

Senator HEFLIN. Thank you. We will probably submit some written questions to you.

[Submissions of Judge George follow:]

STATEMENT
OF
HONORABLE RONALD M. GEORGE
JUDGE OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR LOS ANGELES COUNTY

Mr. Chairman and Members of the Subcommittee:

I have been a judge in the state courts of California for 15 years, presently serving on the Superior Court in Los Angeles. In recent years I have held the position of Supervising Judge of that court's Criminal Division, and have served a term as President of the 1400-member California Judges Association. I am pleased to have been given the opportunity to present my views in support of the position taken by the Judicial Conference of the United States in opposition to S.953 and S.954.

The manner in which prospective jurors are examined both in civil and criminal cases is vitally important not only to the members of the judiciary but also to those citizens who as jurors (or employers of jurors) contribute their time and resources to jury service. The impact, on the efficient administration of the courts, of rules governing the examination of prospective jurors is substantial, as illustrated by the California experience which I have been asked to share with you today.

The present bills under consideration by this subcommittee would render the jury selection process in federal courts similar to that in the state courts of California, where the direct oral examination of prospective jurors by counsel is a primary component of an exceedingly plodding process that enjoys nationwide notoriety. Yet those members of the executive, legislative, and judicial branches of government and public groups who have aligned themselves with the court reform movement in California, focussing their attention on the method of jury selection, have urged that California abandon its time-consuming procedure in favor of the system presently followed in the federal courts!

After briefly summarizing California law and practice pertaining to the examination of prospective jurors, I would like to provide some graphic illustrations of why this subcommittee should seek to have the federal courts avoid rather than emulate the California experience.

California statutory law requires that in criminal cases the trial judge after examining them himself, "shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel." (Emphasis added.) Judicially-adopted standards provide further that in both criminal and civil cases, "During any supplemental examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover possible bias or prejudice with regard to the circumstances of the particular case."[1]

Like S. 953 and S. 954, California statutory and case law requires that examination of prospective jurors by counsel be reasonable and purports to confer discretion upon the trial judge to control the length and manner of questioning by counsel.

Yet trial judges often learn upon review of the trial record by an appellate court, sometimes resulting in reversal of an otherwise flawless judgment, that despite "lip service" to the contrary, the appellate court has narrowly interpreted the scope of the trial court's discretion and taken an expansive view of counsel's right to examine the prospective jurors.

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[1] California Penal Code § 1078; Standards of Judicial Administration Recommended by the Judicial Council of California, Standards 8(a)(1) and 8.5(a)(1).

Quoting law review studies, the California Supreme Court in the leading case of People v. Williams observed that "attorneys improperly use the procedure to influence the jurors, establish rapport, and indoctrinate them with their views of the law;" and that "voir dire is more effective as a forum for indoctrination than for screening biased jurors."[2] Nonetheless the California Supreme Court concluded that "a question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury."[3] Quoting an opinion of the United States Court of Appeals for the Sixth Circuit,[4] the California Supreme Court observed that "'expedition should not be pursued at the cost of the quality of justice'" and that "the potential for anticipatory argument... 'is an unavoidable consequence of the voir dire examination.'"

Are the pitfalls of attorney-conducted examination of prospective jurors avoided by the provisions in S. 953 and S. 954 allotting a minimum of 30 minutes to each party (and 10 minutes additional for each additional party) with discretion in the trial judge to provide counsel with additional time? I believe not, given the manner in which appellate courts tend to review both the scope of trial court discretion and the right of trial counsel to participate in the jury selection process.

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[2] One organization, formed to defend capital cases, has developed "new trial techniques to avoid execution," which include "[p]rolonging trials to allow jurors to become well acquainted with defendants," in part by having criminal defendants "actively questioning jurors." Ann Ginger, Jury Selection in Criminal Trials, New Techniques and Concepts, Lawpress (1977 Supp.), 306.

[3] People v. Williams, 29 Cal.3d 392, 408-409 (628 P.2d 869) (1981).

[4] United States v. Blount, 479 F.2d 650, 652 (6th Cir. 1973).

For example, the judge presiding at a California burglary trial attempted to impose reasonable time limits on the selection of the jury. Each attorney was allowed *30 minutes* to examine the panel of 12 prospective jurors plus an additional 5 minutes for each new juror called after one of the original jurors was excused. Counsel were informed of these time limits at the outset of the case, and defense counsel objected. The trial judge conducted what the Court of Appeal characterized as "a rather extensive voir dire."

The California Court of Appeal stated in its opinion:

> "Although the trial judge has a duty to restrict the examination of the prospective jurors within reasonable bounds so as to expedite the trial, *the fixing of an arbitrary time limit for voir dire in advance of trial is dangerous and could lead to a reversal on appeal*.
>
> Under Penal Code section 1078, the trial court is required to permit reasonable examination of prospective jurors by counsel for the People and for the defendant. What is 'reasonable' obviously involves more than a time factor: it necessarily includes the exploration by counsel in some depth of the many unpredictable variants bearing on a juror's bias or cause for disqualification which develop during the course of examining the prospective jurors. The time required to accomplish this cannot be quantified in advance. Because of what may develop during the voir dire, the trial court's discretion should be exercised by directing counsel to cease questioning when the need arises rather than setting a rigid time limit in advance.
>
> In the present case, the trial court sat by while defense counsel utilized his 30 minutes to question 9 jurors. Either defense counsel asked redundant questions during the 30-minute period which should not have been permitted, or the court's refusal to grant additional time for questioning of the 3 remaining jurors was an abuse of discretion."[5] (Emphasis added.)

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[5] *People* v. *Hernandez*, 94 Cal.App.3d 715, 719-720 (156 Cal.Rptr. 572) (1979) (Citations and footnote omitted.)

One California appellate decision, the Wells case,[6] reversed a manslaughter conviction because the trial judge did not permit an attorney to ask prospective jurors why there were so few members of a racial minority in professional golf and tennis (the case involved neither sport.) This decision was premised upon appellate rulings allowing counsel broad range in their questioning in order to assist them in deciding how to exercise their peremptory challenges.

In this context of expansive appellate implementation of the right to attorney-conducted examination of prospective jurors, it is easy to see why abuse of that right has become more the rule than the exception.

While jury selection may take weeks or months in California, and typically does so in a capital case, jury selection in a comparable case in other jurisdictions employing the federal method will take only days or hours.

We in California of course do not have a monopoly on due process; jurisdictions in which the law permits efficient jury selection have just as fair trials as we do.[7]

For example, although no more favorable result can be imagined from the standpoint of the defendant than what was received by John Hinckley in his trial for the attempted assassination of President Reagan, it took a week or less to pick the jury in his case under federal jury selection procedures. In the well-publicized Ginny Foat murder trial in Louisiana, it took less than three days to pick a jury, and the defendant won an acquittal.

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[6] People v. Wells, 149 Cal.App.3d 721 (197 Cal.Rptr. 163) (1983.)

[7] The senior presiding justice of the California Courts of Appeal has observed: "Our system of justice highly esteems the right of trial by jury. An important corollary is the right to probe the veniremen for possible bias and prejudice. However, the importance of voir dire does not blind us to the fact that it can be abused. In theory, the attorneys try to select neutral and unprejudiced jurors; in practice, each strives to mold a panel favoring his side. To this end, mind-numbing quantities of time may be exhausted interrogating the veniremen. In big cases voir dire may continue wearyingly for weeks or even months. This contrasts unfavorably with, for example, England, surely not an underdeveloped state jurisprudentially, where voir dire is completed in substantially less time, with results not noticeably inferior." People v. Helton, 162 Cal.App.3d 1141, 1144 (209 Cal.Rptr. 128) (1984.)

As the judge in the 2-year long Hillside Strangler trial, I found it rather disconcerting to be congratulated by some of my judicial colleagues for taking "only" 54 court days to select a jury, a shorter period than was anticipated given the complexities of jury selection under California procedure.

In one trial in Los Angeles County (involving one defendant charged with a single count of murder), jury selection began on April 26, 1983, and after 129 court days was completed 9 1/2 months later on February 6, 1984. The jury selection in that case cost taxpayers half a million dollars (it costs thousands of dollars each day to keep a courtroom in operation) and tied up the only Superior Court in the particular district assigned to criminal cases, necessitating the transfer of other felony trials to various distant districts. (See Appendix A.)

When I supervised the Criminal Division of the Los Angeles Superior Court, I frequently had 18 of the 24 judges in the Central District engaged in protracted trials--those defined as trials in excess of two weeks' duration--due largely to the time it takes under California law to examine the prospective jurors.

Sometimes it takes more time to select the jury than it does to put on the remainder of the case from opening statement to submission of the case to the jury.

In one non-murder case involving sex offenses, jury selection consumed 30 court days and the balance of the trial an additional 22 court days. A recent California appellate opinion observes:

> "Because of a tendency of many attorneys to use voir dire as a tool to indoctrinate jurors or to create a favorable predisposition to their cause, jury selection in California has become probably the most time consuming and cumbersome phase of the criminal justice system.[8]

Personally I feel that in the face of our crowded criminal and civil dockets--approximately 200,000 cases awaiting trial in California courts--this condition represents a real sickness in the operation of that state's court system.

Opponents of jury selection reform sometimes allege that capital trials and high-publicity cases should be ignored in that their relative number is small. The answer to this dubious premise is two-fold: first, the effect of these cases is enormous in that a few of them can tie up an entire court system; and secondly, the time-consuming nature of lawyer-conducted jury selection affects the trial of all garden-variety felony and misdemeanor jury trials just as substantially, if not as dramatically.

Nearly 9,000 juries are selected annually in California misdemeanor cases. It is commonly agreed that the typical misdemeanor trial lasts 3 days, one of which is consumed in jury selection. I am informed that in most other jurisdictions it typically takes 1 or 2 hours to pick a jury in a misdemeanor case. If an average of only half a day could be saved in the trial of these misdemeanor jury trials, by switching to the federal method of jury selection, approximately 16 judgeships could be eliminated or devoted to other purposes.

Similarly additional judgeships could be eliminated or devoted to other purposes if, in the approximately 5,000

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8. People v. Renteria, 190 Cal.App. 3d 1016, 1020 (235 Cal.Rptr. 807) (1987.) (Emphasis added; opinion subsequently ordered de-published.)

felony jury trials conducted each year in California, lawyer-conducted voir dire were not required under state law.

The New York Advisory Commission on the Administration of Justice in 1982 recommended to the Governor of that state that if the federal system of jury selection were adopted, the average time of jury selection per case would be reduced from 12.7 hours to 2.5 hours and "New York could create trial time savings equivalent to the work product of 26 additional judges." (See Appendix B.)

We should be concerned with the frequently-voiced concern which the public--as jurors and taxpayers--regularly expresses concerning the intrusive, embarrassing, and time-consuming nature of attorneys' juror selection gamesmanship. This is frequently the only direct exposure the public has to the workings of our judicial system, and it demoralizes them as it does our trial judges.

Many attorneys (sometimes assisted by psychologists and sociologists) follow manuals which set out in detail, page after page, a substantial series of questions to be propounded at every phase of jury selection. These include questions as to the juror's choice of bumper sticker, magazines, television programs, etc. One publication even suggests extensive examination of jurors whom the attorney knows he or she will excuse--for the sole purpose of "educating" the remaining members of the panel as to counsel's partisan position.

This abuse not only promotes court delay and congestion but perverts the ideal that a jury ideally and legally should represent a cross-section of the community. It is clearly preferable to have an impartial judge, with no need to sell himself to each juror as attorneys do, conduct a proper examination possibly assisted by reasonable proposals by counsel for additional areas of inquiry.

During this time of government deficit and continuing demand for government services, we cannot afford the luxury of lengthy and irrelevant jury selection procedures which do not serve to add to the fairness of our judicial process.

An exhaustive 80-page study, entitled Expediting Voir Dire: An Empirical Study, was published in the University of Southern California Law Review in 1971. The conclusion reached by that study, even more valid today in view of changes in the law complicating the jury-selection process in California, was in part as follows:

> "As between the federal and state method, the Los Angeles Superior Court tests established that the federal method takes substantially less time because all of the questions are screened and posed by the judge....
>
> "At least as important as time saving, however, is the need for a fair and impartial jury...
>
> "The Federal method...allows a great savings of judge and juror time as compared to the state method... Further, the method does not allow undue imposition on the time of the jurors and is clearly within the constitutional standards of fairness for criminal trials....
>
> "For these reasons, immediate and careful consideration should be given by all court systems to adoption of the federal method of voir dire examination for all courts, criminal and civil. By thus expediting trials in a manner fair to the litigants, courts will serve the dual purpose of reducing their case backlog and restoring public confidence in the judicial system." [9]

A 1985 report prepared by the Los Angeles County Sheriff's Department indicates that in excess of $20,000,000 per year could be saved in that one county alone if the federal system of jury selection were adopted. (See Appendix C.)

Uniform minimum time limitations such as those specified in S. 953 and S. 954 are inappropriate in cases that may differ vastly in their complexity and in their need for appropriate inquiry into the background of the

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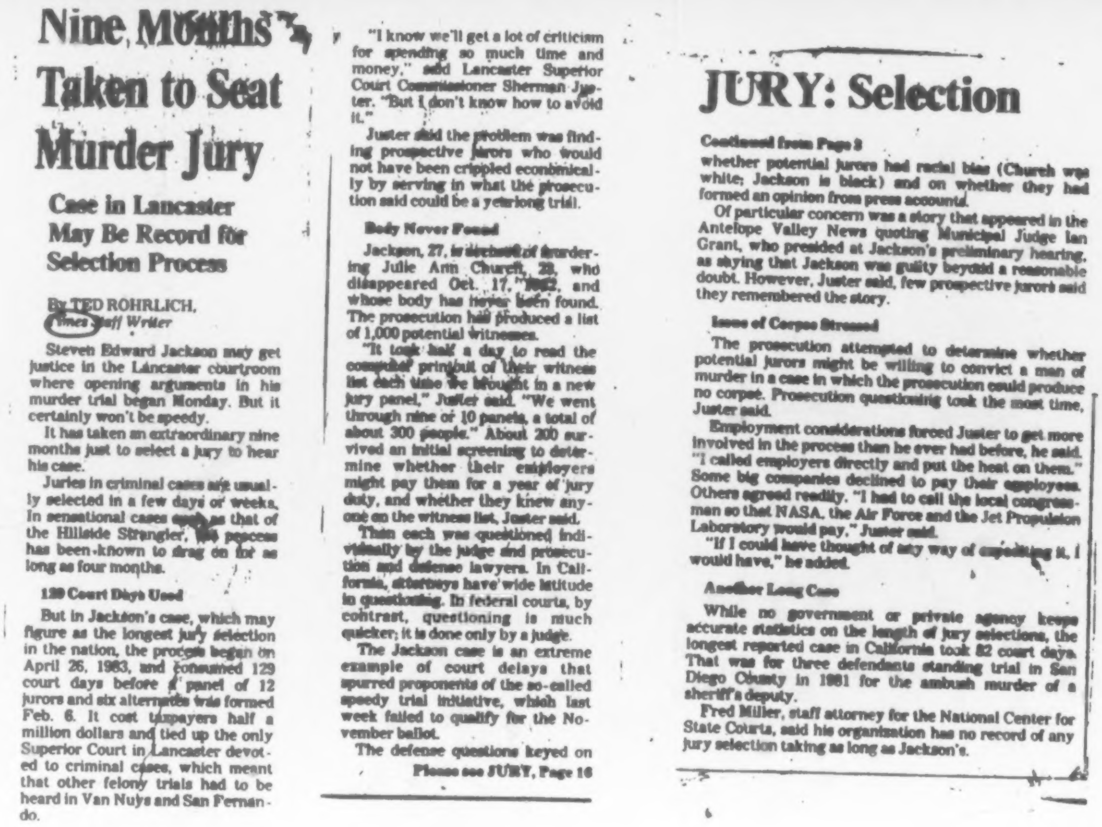
9. 44 U.S.C.Law Rev. 916, 955-956.

prospective jurors. The fact that historically lawyers have been less abusive of the voir dire process in federal courts than in the California courts with regard to the length and manner of their interrogation of prospective jurors is merely a reflection of attorney awareness that under current law federal judges have authority to restrict or immediately terminate the questioning by the attorneys. If federal judges were to lose their present discretion as to whether, and to what extent, to permit lawyer-conducted voir dire, the abuses experienced in the California courts would be duplicated in the federal system.

The California Judges Association, Governor George Deukmejian, and members of the State Legislature have proposed court reforms centered on the jury-selection process, holding up as a favorable example the federal system of judge-conducted examination of prospective jurors. (See Appendix D.) It would indeed be ironic and a step backward for the federal courts to be compelled by S. 953 and S. 954 to retreat into the labyrinth of lawyer-conducted voir dire. The California experience demonstrates the wisdom of permitting the federal courts to continue their long-standing, successful efforts to select juries in a fair and efficient manner without being straitjacketed by the allotment of arbitrary periods of time to trial counsel for what will often turn out to be an abusive and time-consuming examination undeserved by our civic-minded jurors.



Nine Months Taken to Seat Murder Jury

Case in Lancaster May Be Record for Selection Process

By TED ROHRLICH,
Times Staff Writer

Steven Edward Jackson may get justice in the Lancaster courtroom where opening arguments in his murder trial began Monday. But it certainly won't be speedy.

It has taken an extraordinary nine months just to select a jury to hear his case.

Juries in criminal cases are usually selected in a few days or weeks. In sensational cases such as that of the Hillside Strangler, the process has been known to drag on for as long as four months.

129 Court Days Used

But in Jackson's case, which may figure as the longest jury selection in the nation, the process began on April 26, 1983, and consumed 129 court days before a panel of 12 jurors and six alternates was formed Feb. 6. It cost taxpayers half a million dollars and tied up the only Superior Court in Lancaster devoted to criminal cases, which meant that other felony trials had to be heard in Van Nuys and San Fernando.

"I know we'll get a lot of criticism for spending so much time and money," said Lancaster Superior Court Commissioner Sherman Juster. "But I don't know how to avoid it."

Juster said the problem was finding prospective jurors who would not have been crippled economically by serving in what the prosecution said could be a yearlong trial.

Body Never Found

Jackson, 27, is accused of murdering Julie Ann Church, 23, who disappeared Oct. 17, 1982, and whose body has never been found. The prosecution has produced a list of 1,000 potential witnesses.

"It took half a day to read the computer printout of their witness list each time we brought in a new jury panel," Juster said. "We went through nine or 10 panels, a total of about 300 people." About 200 survived an initial screening to determine whether their employers might pay them for a year of jury duty, and whether they knew anyone on the witness list, Juster said.

Then each was questioned individually by the judge and prosecution and defense lawyers. In California, attorneys have wide latitude in questioning. In federal courts, by contrast, questioning is much quicker; it is done only by a judge.

The Jackson case is an extreme example of court delays that spurred proponents of the so-called speedy trial initiative, which last week failed to qualify for the November ballot.

The defense questions keyed on

Please see JURY, Page 16

JURY: Selection

Continued from Page 3

whether potential jurors had racial bias (Church was white; Jackson is black) and on whether they had formed an opinion from press accounts.

Of particular concern was a story that appeared in the Antelope Valley News quoting Municipal Judge Ian Grant, who presided at Jackson's preliminary hearing, as saying that Jackson was guilty beyond a reasonable doubt. However, Juster said, few prospective jurors said they remembered the story.

Issue of Corpse Stressed

The prosecution attempted to determine whether potential jurors might be willing to convict a man of murder in a case in which the prosecution could produce no corpse. Prosecution questioning took the most time, Juster said.

Employment considerations forced Juster to get more involved in the process than he ever had before, he said. "I called employers directly and put the heat on them." Some big companies declined to pay their employees. Others agreed readily. "I had to call the local congressman so that NASA, the Air Force and the Jet Propulsion Laboratory would pay," Juster said.

"If I could have thought of any way of expediting it, I would have," he added.

Another Long Case

While no government or private agency keeps accurate statistics on the length of jury selections, the longest reported case in California took 82 court days. That was for three defendants standing trial in San Diego County in 1981 for the ambush murder of a sheriff's deputy.

Fred Miller, staff attorney for the National Center for State Courts, said his organization has no record of any jury selection taking as long as Jackson's.

APPENDIX A

Los Angeles Times, February 14, 1984.

BEST AVAILABLE COPY

RECOMMENDATIONS TO GOVERNOR HUGH L. CAREY
REGARDING PROPOSALS FOR JURY
SELECTION REFORM

From the Executive Advisory Commission
on the Administration of Justice
Arthur L. Liman, Chairman
November 15, 1982

APPENDIX B

JUDICIAL VOIR DIRE

For more than a decade, proponents of New York court reform have focused on the protracted and time-consuming procedure of jury selection known as _voir_ _dire_, or the pretrial examination to select trial jurors. This process allows attorneys to question potential jurors and to exclude them from the jury by challenging them -- either peremptorily, without a stated reason, or for cause, on specific grounds set forth in the Criminal Procedure Law. Conducted by the judge, or counsel, or both, _voir_ _dire_ is designed to guarantee every defendant an impartial jury.

In New York State, the law requires that attorneys must be permitted to question prospective jurors. In the federal courts, and in a number of states as well, the court conducts the _voir_ _dire_, with attorney participation at the court's discretion. The attorney-conducted process has drawn criticism because it takes considerably longer than judge-conducted _voir_ _dire_ and its impact on the pace of justice in our courts has been a continuing cause for controversy. Currently there are four bills before the Legislature, sponsored by the Office of Court Administration (OCA), by Governor Carey, by Mayor Koch, and by Bronx County District Attorney Merola, proposing that New York State change its system of _voir_ _dire_ from an attorney-conducted procedure to the federal system.

Proponents of New York's present system argue that attorneys are more suited to discover bias than judges, because of their familiarity with a case, and because as adversaries they are likely to probe deeper. These same advocates claim that the federal system is necessarily superficial and undermines the effective use of challenges by attorneys. They justify the greater length of the attorney-conducted voir dire on the grounds that unrestricted adversarial questioning ensures an impartial jury.

Protagonists for the federal system, on the other hand, maintain that a court-conducted voir dire elicits bias adequately and consistently upholds constitutional standards of fairness for defendants. Moreover, they claim that attorneys abuse voir dire, using it to condition jurors by subtle lobbying, or to engage in personality contests with opposing counsel, or to question jurors beyond the proper limits of privacy. They emphasize the expediency of the federal system, which is significantly shorter than the attorney-conducted voir dire. On average, federal voir dire is completed in two-and-a-half hours.

In considering this controversy, the Commission undertook a survey of eleven counties, to determine how much of their trial time was taken by voir dire. Although the size of the survey was modest, its conclusions are consisten with observations by previous students of the system. In August, September and October of 1981, court clerks in the five boroughs of New York City, as well as in Erie, Nassau, Niagara, Onondaga, Sullivan and Westchester counties completed survey forms (see appendix A). The results, compiled with the cooperation of OCA and the Division of Criminal Justice Services (DCJS), on the basis of 462 responses, indicated that an average voir dire takes 12.7 hours out of a total of 35 hours, or 40% of trial time. Moreover, in at least 20% of the cases, voir dire time actually exceeded the length of the trial itself.

These figures are higher than those of a previous study by professors at John Jay College which was limited to New York City. Their results showed that voir dire consumed a third of trial time, or 8-1/2 hours per trial.

Compared to the average 2-1/2 hours used for a federal voir dire, 12.7 hours have dramatic implications when they are applied to approximately 3,500 felony jury trials that occurred in 1981 in New York State. Using the survey findings, we estimate that by adopting the federal system, New York could create trial time savings equivalent to the work product of 26 additional judges.

To arrive at this estimate, we made certain assumptions; we assumed that the sample was representative, and that in New York the average length of a court-conducted voir dire would not exceed the federal average of two-and-a half hours. We assumed that in spite of the customary delay in getting all the participants ready for trial, trial parts would be in use 95% of the time - and given the level of cases awaiting trial, with more effective case management, we believe this should be the case. We further assumed that a judge would spend at least six court hours during a judicial day (there are conflicting estimates from OCA, of 7-1/2 hours, and from a 1976 study of the Economic Development Council (EDC), of 3-1/2 hours); that there are 220 days in a judicial year (an OCA figure which includes vacations and sick-time). We assumed that the annual cost of a felony trial part is $500,000 (according to an OCA estimate); and finally we assumed that there are 3,500 felony voir dires each year (according to the DCJS Quarterly Report, January, 1982).

If New York changed to the federal system, and the average time of a voir dire were reduced from 12.7 hours to 2-1/2 hours, it would mean that each of the 3,500 annual felony trials would be shortened by more than 10 hours. Incorporating the assumptions listed above, that figure translates into approximately 35,700 hours, or 5,967 six-hour days of judicial time. Divided by the 220 days in a judicial work-year, and assuming the 95% use of courtrooms, this number represents 25.7 hypothetical judges and their support staffs, constituting 25.7 felony trial parts, which would require $12.85 million for the State to fund.*

Our results also suggest that benefits would be greatest in the busiest counties in New York City, where they are most needed, and where *voir dire* takes the longest. (See appendix B) Moreover, these economies would allow the shifting of judicial resources to the civil courts where backlogs are beginning to increase again.

These figures present strong argument for change. But because the process of jury selection pertains to one of our basic constitutional rights - the guarantee for every criminal defendant to a jury trial by impartial peers, changes should not be made if they arise solely from administrative imperatives. Proponents of the status quo may argue that reform can come from within the system if judges would make a greater use of the authority, given them by the Court of Appeals in *People* v. *Boulware*, to control the scope and duration of the *voir dire*. We have no doubt that most judges, including those who presided over the cases in our survey, where the average *voir dire* took 12.7 hours, feel they exercised that authority. But judges have difficulty in changing the *mores* in a system where attorneys have had so much freedom. We recognize, for instance, that *voir dire* is often used for other purposes: to delay the trial, while attorneys find time to locate or prepare a witness, or to pre-condition a juror to look with favor upon their interpretation of the facts. All these factors, old evolved habits in the attorney-conducted jury selection process, contribute to delay without accomplishing the primary function of voir dire, to pick a fair and impartial jury.

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* The estimated number of additional trials that could be tried is elusive. For example, if it were assumed that adoption of the federal method would result in a 30% time savings, the courts could hear 30% more trials than they did in 1981 - or 1050 more trials. If, however, it were assumed that on a statewide basis, those judges sitting in criminal trial parts average from 17-23 cases a year - the range we have been given - the 26 hypothetical new judges could preside over 442 to 520 more trials.

Therefore, without denying the importance of defendants' rights, we cannot responsibly ignore the findings in our survey - namely, that our court system, which is reeling under the pressures of rising indictments, jail backlogs, and inadequate resources, currently allocates 40% of its trial time to the examination of jurors before it even begins a trial. In our inundated system - where some defendants wait more than a year to be tried, and where both prosecutors and defense attorneys alike engage in extensive plea bargaining, in part, because the volume of cases will not permit a trial for everyone - we think that our courts can no longer allow such a massive allocation of time to the voir dire.

We therefore endorse the proposals already before the Legislature, that New York State change to judge-conducted voir dire. In so doing, we acknowledge the concern that the federal system, if it is administered with rigidity, is too restrictive. We urge that flexibility be maintained in the questioning process, and that supplementation by counsel be permitted at the court's discretion. For those who argue that permitting any questioning by attorneys will inevitably produce some delays, we point out that judicial discretion would be subject to review by the appellate courts, by court administrators, by peer pressure, by media, and by the public. If flexibility were observed, we are confident that the change to judge-conducted voir dire would expedite the process of jury selection without sacrificing defendants' rights.

"STRUCK JURY" SYSTEM

Traditionally juries in New York have been selected by filling the jury box with 12 prospective jurors. As prospective jurors were removed, others were called at random from the panel in the courtroom. Attorneys had no way of knowing who would be called to replace the juror they had just challenged. Their decision concerning the relative bias of the challenged juror, compared to the potential bias of the new juror, was -- in the words of one litigator -- "a crapshoot."

Recently, the Legislature ratified a custom already in practice in many courtrooms. Judges, instead of calling 12 jurors at a time for separate rounds of examination, now can seat and examine at one time as many prospective jurors as deemed necessary. By reducing the number of examination rounds required, this reform is intended to shorten the voir dire.

We urge the adoption, by the Legislature, of an additional reform known as the "struck jury" system. This method of exercising challenges allows the attorneys to know in advance the order in which the jurors will be considered and more importantly, it allows them to compare all prospective jurors before making their selections.

Although there are a variety of ways in which a struck jury system can be implemented, the basic procedure is as follows: a panel of jurors is brought to the courtroom; their number is equal to the number of potential jurors and alternates to be selected, plus the total number of peremptory challenges available to both sides, plus the total anticipated challenges for cause. This entire panel is then numbered in order as their names are drawn by lot. The court delivers its preliminary remarks to the entire panel and conducts the voir dire. As we have suggested above, the court, in its discretion, may allow supplemental questioning by the attorneys. Upon the completion of the questioning, challenges for cause are made. The attorneys can then exercise their peremptory challenges by the alternate striking of jurors' names from a list of the panel. After both sides have either passed or exercised their challenges, the unstruck jurors are called in order, by number, until a jury is empanelled.

The advantages of the "struck jury" are twofold: it requires only one presentation of introductory remarks by the court and one round of examination of potential jurors. And most importantly, it allows the attorneys to compare all prospective jurors before making their choices. If New York adopted the "struck jury" system, thus providing attorneys with a more equitable and predictable method of exercising their challenges, they would have less need for a large number of peremptory challenges.

PEREMPTORY CHALLENGES

Compared to other states, the number of peremptory challenges allowed in felony cases in New York State is high, and their exercise adds considerably to the time taken by voir dire. In the most recent Legislative session Mayor Koch and OCA submitted proposed bills reducing the number of challenges.

Because of the pending legislation on the reduction of peremptory challenges and its relevancy to the lengthened voir dire process, the Commission included questions on the use of peremptory challenges in the voir dire survey. In approximately 400 responses, we found that in the present system neither side regularly used their allotted quota of challenges. (See appendix C) Defense attorneys used their maximum number of challenges in only 22% of the cases, which was twice as often as prosecutors.

We realize that the survey results may be affected by a litigator's desire to save some challenges as an exercise in caution. Nevertheless, considering the survey data, and considering that New York is liberal in the number of challenges it allows, and reiterating our previous conclusion that we can no longer afford the time spent on the jury selection process, we recommend that there be a reduction in the number of peremptory challenges in each of the felony categories. We recommend that challenges be reduced from 20 to 17 in Class A felonies; that they be reduced from 15 to 12 in Class B and C felonies; and from 10 to 8 in Class D and E felonies.

To ensure flexibility after reducing challenges, we recommend also that trial judges retain the authority to add challenges in special circumstances; in multiparty cases, for instance, or in cases of unusual notoriety where there may have been extensive pretrial publicity. In these cases, the judge should be permitted to increase the number of challenges on application.

NEW YORK STATE COMMISSION ON JURY SERVICE

The preceding recommendations concerning the jury selection process are intended to economize on both time and money spent in a jury trial. However, there are many other aspects of jury service in New York State which require study and reform. We mentioned some in our preliminary report that need examination:

-- procedures used to establish eligibility lists;

-- laws exempting citizens from jury service. Do they justifiably limit the representativeness of juries;

- -- utilization of telephone notice and one-day one-trial experiments;
- -- compensation for jury duty, both as to amount and inequities;
- -- physical facilities for jury service;
- -- sequestration of jurors, which is mandatory only in New York State;
- -- penalties for ignoring jury summonses.

We believe that it is essential to undertake an ongoing assessment of these and other jury matters. We wonder, for example, if the controversy over the method of _voir dire_ could have persisted for so long had there been an institution charged with the responsibility of assessing _voir dire_ practices. A jury management policy that is responsive to juror needs is long overdue.

We recommend the creation of a permanent statewide commission on jury service. This commission should consist of administrative and trial judges, representatives from the civil and criminal Bar, jury commissioners from counties representing diverse populations and trial volumes, and citizens who can represent the essential, if often neglected actor in the jury trial -- the juror.

We note that a project exists in New York State, instituted by the Chief Judge, to improve jury administration in the counties of New York, Queens, Nassau, and Delaware. It involves the collaborative expertise of the State's Unified Court System, The National Center for State Courts, and County Jury Commissioners. We trust that it will demonstrate the benefits of modern jury management to those counties and will provide the example upon which to base a permanent statewide Commission.

Such a Commission would be responsible for reviewing jury service procedures throughout the State and for developing statistical surveys to test their efficiency and fairness. It would study reforms adopted in other States and pilot projects in selected counties and consider the feasibility of expanded or statewide applications. It would serve as a sounding board for innovators, a central policy board for petitioners and an ombudsman for those with grievances. It would advise the Chief Judge, recommending administrative change where appropriate. It would propose statutory changes and lobby with the Legislature for statewide reform.

The right to a trial by jury is a measure of the freedom in our society which we jealously guard; yet jury duty is perceived as an ordeal. Too often New Yorkers go to great lengths to avoid it; they are unnecessarily inconvenienced and their time is wasted.

In our view, without the adoption of innovative jury management practices, the extravagent squandering of juror energy and good will is inevitable; and without the revision of present jury selection procedures, the needless consumption of court time will continue.

Appendix A

THE EXECUTIVE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE JURY SELECTION QUESTIONNAIRE

County ____________ Ind. No. ____________ Top Charge ________
Person Preparing Form & Title ____________________
Date and Time Panel Arrived ____________________
Size of Original Panel ____________________
Date & Time of Additional Panel ____________________
Size of Additional Panel ____________________

Log of Actual Voir Dire - Including Selection of Alternates
(Please Add Additional Lines if Needed)

____

1st Date ____________________
Time Began ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
2nd Date ____________________
Time Began ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
3rd Date ____________________
Time Began ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________
Time Resumed ____________________ Time Ended ____________________

Total Panel Members Excused by Court ____________
Total Panel Members Challenged for Cause
By People ____________ By Defense ____________
Total Panel Members Peremptorily Challenged
By People ____________ By Defense ____________
Number of Alternate Jurors Selected ____________
If a plea occurs during jury selection, please submit form to sh
status at time of plea.

Log of Actual Trial Time, i.e., People's Opening Statement Through Charge
(If Trial Exceeds Four Days, Please Add Additional Sheets)

1st Date ______________

Time Began ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

2nd Date ______________

Time Began ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

3rd Date ______________

Time Began ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

4th Date ______________

Time Began ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Time Resumed ______________ Time Ended ______________

Trial result ______________________________

If trial ends in any manner other than by verdict, please submit this form for the period of trial which occurred.

Appendix B

Total Number of Trials for 1981 and County Averages in Hours for Three Term Survey

County	Total Trials-1981 (Through Completion of Proof)	Survey Average Voir Dire Time	Survey Average Trial Time (Opening Statement Through Charge)
Bronx	545	14.6	23.3
Kings	605	12.0	28.1
New York	710	14.2	19.6
Queens	453	13.4	20.9
Richmond	31	8.8	46.0
Erie	142	8.6	18.1
Nassau	143	10.1	17.4
Niagara	37	8.8	16.0
Onondaga	65	9.4	12.4
Sullivan	3	17.3	27.3
Westchester	140	14.3	21.7

Values rounded to nearest tenth, .05 is dropped.

Appendix C

Peremptories

Charge	Maximum Allowed	Average Defense Exercised	Average Prosecutor Exercised
A	20	15.6	14.1
B	15	11.2	10.0
C	15	10.4	9.7
D	10	8.0	7.0
E	10	8.0	7.2

While defense attorneys used their maximum number of challenges in 22% of all cases (n = 405), prosecutors used their maximum number of challenges in 11% of all cases (n = 408).

COUNTY OF LOS ANGELES
SHERIFF'S DEPARTMENT

DATE April 15, 1985

OFFICE CORRESPONDENCE FILE NO.

FROM: INSPECTIONAL SERVICES BUREAU TO: COURT REFORM COMMITTEE

SUBJECT: ANTICIPATED COST SAVINGS

1. Judicial Voir Dire

a. Misdemeanor Cases

Juries sworn, FY 82-83	8603
Estimated hours saved per case if judicial voir dire	x 2
Total hours	17,206
Court cost per case related hour	x $379.58
Total savings	$6,531,053.40

b. Felony Cases

Juries sworn, FY 82-83	5308
Estimated hours saved per case if judicial voir dire	x 10
Total hours	53,080
Court cost per case related hour	x $386.69
Total savings	$20,525,505

2. Hearsay in Preliminary Hearings

Preliminary Hearings, FY 82-83	49532
Estimated time, in hours, per hearing	x 1.75
Total hours spent	86681

APPENDIX C

Preliminary Hearings, FY 82-83	49532
Estimated time, in hours, if hearsay were admitted	x .25
Total	12383
Hours spent.	86681
Anticipated if hearsay admitted	- 12383
Total hours saved	74298
Court cost per case related hour	$ 379.58
Total savings	$28,202,034.00

Total Anticipated Savings

Judicial voir dire	$27,056,558
Hearsay admitted in preliminary hearings	$28,202,034
Total	$55,258,592

CALIFORNIA REPORT

WEEK OF MARCH 22, 1986

By George Deukmejian, Governor

State of California

see p. 2

[NOTE: This week's California report addresses the issue of court reform.]

The right to a speedy trial is one of the most basic rights that we, as free Americans, enjoy. Swift and sure justice is also essential for protecting an innocent public, and punishing the guilty in an appropriate manner.

Unfortunately, this underpinning of our judicial system has been threatened by backlogs, inefficiencies and inexcusable delays. The length of time that it takes for civil and criminal cases to come to trial is too long and the taxpayers are hurt by rising court costs.

In Los Angeles County, for example, it takes nearly three years for a civil case to come to trial. In other areas of the state, it can take up to two years before a civil case will be heard.

According to standards recommended by the American Bar Association, 90 percent of all civil cases should be settled or otherwise concluded within 12 months. With criminal proceedings, a case must be dismissed if the defendant has not been brought to trial within 60 days. While many defendants waive the right to a speedy trial, more than half of all criminal cases begin after this sixty-day period.

This type of delay results in reduced court access for civil litigants and a loss of public confidence in the judicial process in our state. It also risks the dangerous situation of setting some criminals free before they can be brought to justice.

To remedy the problem that unfair, wasteful and unnecessary delays pose for our system of justice, I am proposing comprehensive reform legislation which will promote efficiency and yet still assure fairness in California's trial courts.

This reform package will also provide for the state to take over the costs of the court system and relieve local governments from the financial strain of overseeing the judicial system. It will provide for greater management and control of the pace of civil and criminal legal

APPENDIX D

proceedings. And, it will ensure that judges, rather than attorneys, determine how quickly cases move through the courts.

One aspect of our current system that breeds delay, is the jury selection process. To reduce costs and the amount of time needed to select juries, I am proposing that the number of jurors required in our Municipal and Justice courts be reduced from twelve to eight. Tradition tells us that twelve is the appropriate number of people to serve on a jury. But, a number of reliable studies have shown that twelve jurors are not necessary to ensure a fair and impartial trial.

Another aspect of our reform program follows the lead of the federal court system by allowing judges, rather than attorneys, to question prospective jurors. This approach has ensured impartial juries in federal courts, even as it hastens jury selection.

The number of prospective jurors that could be indiscriminately removed from a jury panel would also be limited under this court reform legislation. By limiting this "pre-emptory" challenge, a great deal of time would be saved and again, justice would still be served.

Other aspects of reform are aimed at limiting the tactics used by attorneys to create unnecessary delays in bringing cases to trial. Our legislation would also bring California's courtrooms into the 20th Century by allowing the use of tape and video recording for transcribing the proceedings and preserving the court record. This legislation also allows for the use of communications technology to help to resolve cases before they go to trial. Finally, our proposal will include the implementation of a court fee structure which will benefit taxpayers, allow greater access to the courts, and encourage the early resolution of cases.

This plan for the reform of our courts is a necessary and important step toward creating a judicial system that avoids waste and delay, and which promotes fairness and efficiency. It will help restore confidence in our criminal justice system. It will better protect the public by ensuring that dangerous criminals aren't set free simply because the courts are too crowded. It will benefit the accused by providing them with the fair and speedy trial that is their sacred right under our constitution.

Please join me next week for another California Report.

# # # # #

77601. This chapter shall not apply in any county for any fiscal year in which the distribution of moneys to cities in that option county is not made as provided in this article.

SEC. 13. Section 1070 of the Penal Code is amended to read:

1070. (a) If the offense charged be punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to ~~26~~ *18* and the state to ~~26~~ *18* peremptory challenges. Except as provided in subdivision (b), on a trial for any other offense, the defendant is entitled to 10 and the state to 10 peremptory challenges.

~~(b) If the offense charged be punishable with a maximum term of imprisonment of 90 days or less,~~

(b) If the offense charged is a misdemeanor, the defendant is entitled to six and the state to six peremptory challenges.

SEC. 14. Section 1078 of the Penal Code is amended to read:

1078. *(a)* It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury ~~. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel~~ *in accordance with this section.*

The scope of the examination shall be limited to questions reasonably designed to assist counsel in the intelligent exercise of challenges for cause.

(b) Except when the court determines that the direct and oral questioning of prospective jurors by counsel is necessary in order to select a fair and impartial jury, the questions shall be propounded to the prospective jurors by the court rather than by a party to the action or by counsel.

(c) If a party or counsel desires a question to be asked during the examination, the counsel shall submit the question to the court. The court may, in its discretion, propound the question to the prospective jurors, if it determines that the question is reasonably designed to

assist the party or counsel in the intelligent exercises of challenges for cause.

(d) The examination of any prospective juror shall occur in open court and in the presence of the other prospective jurors, except that the court may conduct the examination of a prospective juror out of the present of the other prospective jurors when extraordinary circumstances, based on the particular facts of the case before the court, require an examination out of the presence of the other prospective jurors in order to select a fair and impartial jury, or when all parties to the action stipulate that the examination may be conducted in that manner.

SEC. 15. This act shall become operative on July 1, 1987.

SEC. 16. Except as provided in Section 17, it is the intent of the Legislature that the initial funds needed for the purposes of this act shall be provided in the Budget Act of 1987.

SEC. 17. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

~~Procedure is amended to read:~~

~~667.7. (a) In any action for damages for personal injury or death, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump/sum payment if the award equals or exceeds fifty thousand dollars ($50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future~~

Putting a cap on voir dire

We can turn out fair verdicts—and save time—by letting judges ask the questions

by Roderic Duncan

Roderic Duncan

Horror stories abound on how long it takes to pick a jury in California criminal cases: almost four months in the "Hillside Strangler" case, seven months in David Carpenter's trial in Santa Cruz, nine months in the Los Angeles murder trial of Steven Jackson.

Ever since the rules for voir dire were rewritten by the Supreme Court in *People v Williams* ((1981) 29 C3d 392, 174 CR 317), trial judges have been unable to curb the apparently insatiable desire of lawyers to question prospective jurors. A ray of hope for allowing the trial judge some discretion emerged recently in *People v Edwards* (Feb. 28, 1986, No. AO19571), a little-noted decision of the First District Court of Appeal. Unfortunately for the administration of justice, the ray shone only briefly.

In *Edwards*, Marin County Superior Court Judge Henry J. Broderick presided over a murder trial involving a homosexual relationship between a young black defendant and a 62-year-old white male victim. The judge asked each prospective juror whether the racial aspect of the case would cause any problem. Whenever there was an answer indicating potential bias, he conducted a thorough follow-up. None of the jurors eventually seated to try the case demonstrated any sort of racial prejudice.

But the defense attorney sought to inquire further. He wanted to know whether each of these residents of Marin County—San Francisco's most affluent suburb—knew any black people. It was the sort of question a jury selection expert would probably feel was very meaningful. Judge Broderick wouldn't allow it. He said he had covered the subject of racial prejudice, and still would allow questions on whether race had any connection with a propensity to commit crime. But he would not allow questions that "have the prospect of making this a race case."

Writing for the majority, Justice William R. Channell upheld the trial decision by relying on the considerable discretion to contain voir dire purportedly granted by the Supreme Court in *Williams*. Justice Marcel B. Poche dissented, stating that instead of "containing the range of questioning," the trial judge was "eliminating questioning." Voir dire had covered 1,300 pages of transcript over nine days. More than 46 potential jurors had been rejected. But Justice Poche said a negative answer to the challenged question might well have indicated grounds for the prudent exercise of a peremptory challenge. Therefore, under the *Williams* standard, its elimination was grounds for reversal.

The state Supreme Court eliminated the only appellate decision truly supportive of trial court discretion in voir dire.

Trial judges hoping for some relief in voir dire carefully kept their eyes on *Edwards* in the Subsequent History Table of the advance sheets. Last June, almost a year after the original opinion had been filed, the Supreme Court ordered it not to be published in the permanent volumes—eliminating the only appellate decision truly supportive of trial court discretion in voir dire.

No limits

The depublication of *Edwards* leaves as the chief guidepost for trial judges a 1983 decision from the Second District. *People v Wells* (149 CA3d 721, 197 CR 163) also involved the difficult task of searching for racial prejudice in a jury panel. A black defendant was

Continued on page 58

Roderic Duncan is an Alameda County Superior Court judge.

(California Lawyer--the official publication of the State Bar of California) March, 1987

Opinion

Continued from page 14

charged with murdering a white woman. The late Judge David N. Fitts of the Los Angeles County Superior Court prevented defense counsel from asking a number of questions, including why jurors thought there are so few black professional golfers, tennis players, corporation presidents and governors.

The court of appeal found that Judge Fitts had appropriately excluded questions about why prospective jurors voted as they did on Proposition 8, and how they felt about *Playboy* magazine. But it reversed a conviction of manslaughter, finding that the question about black golfers and tennis players might well have developed material for the intelligent use of a peremptory challenge. Unfortunately, on remand there was no opportunity to determine whether asking the question might have produced a jury more sympathetic to the defendant because by that time he had accumulated 1,314 days in custody and pled guilty for time served.

Voir dire in DUI cases now routinely consumes two days, frequently three.

Many trial judges have decided that if exclusion of such a question is grounds for reversal, it is too risky to rule out almost any line of inquiry. And although *Wells* was a murder case, its rule extends even to misdemeanors. In the large municipal court where I recently completed 11 years' service, voir dire in driving-under-the-influence cases now routinely consumes a minimum of two days, frequently three. Young lawyers recite their questions from dog-eared sets of Xeroxed inquiries, sometimes hardly glancing up to the faces of the prospective jurors. When voir dire is finally over, the evidence can normally be presented in a little over a day.

The literature on trial practice insists that extensive questioning during voir dire by the lawyers is an essential part of a fair trial in both civil and criminal proceedings. Many authors continue to recommend evading judges' efforts to prevent the widespread use of voir dire for "educating" the jury, obtaining commitments, creating prejudice for or against a party or indoctrinating and instructing on the law. One commentator notes: "Much of what purports to be serious literature on voir dire would be hilarious except that it indicates the depth to which the pursuit of victory can descend." Maxwell, *The Case of the Rebellious Juror*, 56 ABA J 838, 842 (1970).

Jurors are predominantly public-spirited people who want to do what is right.

False assumptions

Proponents of lengthy voir dire base their argument on two assumptions I consider false: (1) a juror who harbors some prejudice relevant to a case will vote with the prejudice regardless of evidence indicating a contrary result, and therefore, (2) a jury that has been extensively questioned by lawyers and sanitized through challenges will produce a verdict different from a jury that has been chosen more quickly.

All the psychological studies of jury selection recognize that our perceptions and decisions are influenced by our numerous prejudices. A growing army of jury selection experts are advertising their ability to advise lawyers how to identify jurors most sympathetic to their cases—for fees beginning at about $2,500. One expert has written that a decent exploration of possible racial prejudice requires 120 questions. These experts seem to assume a lot of jurors are Archie Bunker types who attempt to hide their biases for the chance to punish some disliked class of persons.

But anyone who has done much trial work should recognize that jurors are predominantly public-spirited people who want to follow the rules and do what is right. Evidence and argument by able advocates neutralize all but the most prejudiced by appealing to the very real and deep-seated American tradition of fair play.

There are some who lie during voir dire. In an unfamiliar room filled with people they do not know, few are prepared to admit opinions that indicate an inability to be fair. But artful questions designed by lawyers to reveal these hidden prejudices rarely fool anyone. I believe that most people biased for or against the defendant would be eliminated after judicial voir dire just as they are after questioning by lawyers.

The University of Chicago Jury Project interviewed 225 jurors at the conclusion of service in the late 1950s. The project's report (Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S Cal L Rev 503 (1965)) indicated that attorneys (who had been subjected to strict limits on their voir dire) totally missed many fairly obvious prejudices based on relationships with parties involved, occupation, past experiences and other fundamental circumstances. It concluded, "Voir dire is grossly ineffective as a screening mechanism" and is "utilized much more effectively as a forum for indoctrination than as a means of sifting out potentially unfavorable jurors" (at 528).

Professors Zeisel and Diamond report on an even more telling study conducted in 1976 and 1977, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan L Rev 491 (1978). In 12 cases, they collected the jurors who had been peremptorily challenged by the lawyers. These jurors were then seated in the courtroom to jointly observe the remainder of the trial. At the conclusion, their votes were analyzed. In seven of the 12 cases, the study indicated that if the persons challenged had been left on the jury the final verdict would have been no different from the actual verdict.

Judicial voir dire

I believe we can turn out verdicts as fair as those produced under our present wearying procedure in much less time if we join the federal courts and a growing number of states to make voir dire the exclusive province of the trial judge.

The citizens are showing their distaste for our tedious procedures by staying away in droves.

Questioning by the judge must, of course, be more than perfunctory. In capital and high publicity cases it will be lengthy. It should be aided by proposed questions submitted to the judge by the lawyers. But only by removing lawyers from the active questioning of the jurors will we bring under control a process that is threatening to dwarf the remaining phases of trial.

The citizens we rely upon to serve as jurors are now showing their distaste for these tedious procedures by staying away in droves. When I served recently as the presiding judge of my municipal court, I discovered that two-thirds of those summoned for jury duty never appear or respond in any way. Many who had previously appeared wrote letters saying they strongly dislike the jury selection process and don't want to participate in it again. I believe that the best way to preserve the jury system is for the Legislature to turn voir dire back to the judges. ☐

QUESTIONS AND ANSWERS

1. Judge George. I can imagine your frustration in the well-publicized "Hillside Strangler" trial where 54 court days were spent trying to select a jury.

> Using this as a case example, could you elaborate some on the process that you as presiding judge used to direct the voir dire? How much of it was conducted by counsel? Do you think that they subjected the prospective jurors to substantial abuse, or succeeded in selecting a jury biased in one direction or another?
>
> How long do you think the process would have been if the federal rules had been followed?
>
> How long do you think it would have taken if my proposed legislation had been in effect?

Initially I alone inquired of 360 prospective jurors, selected at random from the county pool of jurors, regarding their availability to serve without undue hardship on a case of the then-estimated duration (i.e. 9-12 months, although in fact the trial due to unforeseen developments -- including the length of counsels' voir dire -- ended up taking two years and two days.) It took me less than two days to eliminate those jurors who could not serve due to the anticipated length of the proceedings. The remaining 120 prospective jurors were then examined by me on an individual basis, as required by California law, relative to their ability to consider both the death penalty and life imprisonment without possibility of parole as possible punishments in the case at hand. Subsequently counsel inquired on this issue as well. After the excusal of 40 of the 120 for cause based on their views concerning the punishment issue, I and then counsel inquired of the 80 regarding their attitudes on other issues arguably relevant to their task as jurors in the case.

My examination of the prospective jurors on both the punishment issue and the general areas was, in my opinion, probing and adequate for the purpose of obtaining fair and impartial jurors. I framed my questions only after consulting in chambers with all counsel regarding areas of inquiry and specific questions proposed by them, and I agreed to most of their requests.

Yet when counsel's turn came to exercise their almost limitless right to inquire directly of the prospective jurors, they (1) frequently ignored my suggestions to avoid repeating questions already posed by the court, (2) repeatedly addressed identical questions to each juror in the jury box individually rather than collectively, and (3) frequently asked tedious, slanted, and intrusive questions of the jurors which questions in my opinion were designed not to eliminate unfair jurors but instead to bias, charm, or otherwise improperly influence the jurors.

Since both sides were entitled under California law to engage in this exercise, the end result was not a biased jury. However, the jurors were often subjected to intrusive and offensive questioning, and the court system suffered the consequence of a substantial waste of time and resources.

In my opinion under the current federal rules, jury selection in this case would have taken a maximum of 10 days: 2 days for the initial screening for hardship plus 8 days for voir dire conducted by the trial judge. This is based on the assumption of the remaining 120 jurors being examined at the rate of 15 jurors a day (an average of 3 jurors per hour, with the court having 5 hours available per day to devote to jury selection.) As you recall, under California law jury selection in fact took 54 days.

In response to your question how long jury selection would have taken under S. 954, I would first observe that the trial judge would probably exercise his or her discretion under the statute so as to allot more than the minimum mandatory 30 minutes for questioning by each side, given the strict manner in which appellate courts tend to review the exercise of such discretion and the broad scope that is afforded counsel's right to voir dire prospective jurors (as illustrated by the Hernandez case cited in my written statement filed with the Subcommittee.) But even assuming that the trial judge would not allocate any additional time to counsel and that, despite the average 20-minute voir dire by the trial judge, each counsel would use up the entire 30 minutes per side (the latter being a reasonable assumption in my opinion), an additional 120 hours (one hour for each juror) or 24 days would be added to the jury selection process under S. 954, for a total of 34 days' jury selection in the case.

2. Judge George, on page 10 of your statement, you state that if an average of only one-half day could be saved in misdemeanor trials by switching to the federal method of jury selection, 16 judicial positions could be eliminated or devoted to other purposes. I think that is certainly a worthy goal. However, it doesn't appear to me on the surface that it is necessary to completely eliminate counsel participation in the process in order to reach this goal.

> Could you please comment on this in light of the provisions in my bills that would restrict counsel involvement to a total of one hour?

I agree that the elimination of "counsel participation in the process" is unnecessary and undesirable. The question, as I see it, is whether the "participation" need consist of direct, oral examination by counsel. In my opinion counsel may productively participate, as federal judges often permit, by advancing for the judge's consideration reasonable proposals for areas of inquiry by the judge or even for specific questions to be asked by the judge. In this situation it is then up to the judge to determine in light of all the circumstances the extent to which the judge will pursue these suggested lines of inquiry. As indicated in my response to question 1, the mandatory allotment of one hour per case for attorney-conducted voir dire (plus additional time in multiple party cases) under S. 953 and S. 954 would, in my opinion, result in a substantial additional expenditure of court time and resources without any corresponding benefit by way of enhancing the fairness of the proceedings.

3. Judge George, your testimony draws a parallel between my bills and current law in California. However, as I see it, my bill are very different from California law and would solve the major problem associated with the California system by limiting attorney examination to a total of one hour for both sides or two hours if there are multiple defendants.

Would you please comment on this?

I would respectfully disagree with your conclusion that your bills "are very different from California law." As noted on pages 3-7 of the written statement which I submitted to the Subcommittee, California statutory and case law -- like S. 953 and S. 954 -- requires that examination of prospective jurors by counsel be reasonable and purports to confer discretion upon the trial judge to control the length and manner of questioning by counsel. Yet attempts to curtail excesses in lawyer-conducted voir dire frequently result in appellate court reversal of an otherwise-flawless judgment. The Hernandez case which I discussed specifically involved a trial judge's attempt to do what S. 954 would do: impose a 30-minute time limit on each attorney's voir dire. Yet it was held by the California Court of Appeal (as it might be held by a U. S. Court of Appeals, if S. 953 and S. 954 are passed) that "the fixing of an arbitrary time limit for voir dire in advance of trial is dangerous and could lead to a reversal on appeal." For this reason I do not agree that S. 953 and S. 954 "would solve the major problem associated with the California system."

4. Judge George, in reading through your prepared statement, I seem to get some conflicting signals from you. On the one hand, you oppose the proposed legislation because it would require the court to provide counsel with a minimum amount of time to directly examine prospective jurors. On the other hand, you object to the bills because one to two hours is not adequate for really complicated cases. I agree with you that one to two hours is probably not adequate for the more complicated cases. That is why I included a provision giving the court complete discretion in determining whether additional time is needed.

Do you have any suggestions that would guarantee counsel the right to examine prospective jurors and at the same time would not duplicate the California rule and would not establish an arbitrary time limit as my bill does?

Noting my expressed opposition to the proposed provision for a mandatory minimum of one hour for attorney-conducted voir dire, and my opposition based on the possible inadequacy of one hour in a truly complex case or complicated situation involving a particular juror, you have indicated to me in your letter that you "seem to get some conflicting signals" from me. I would respectfully submit, however, that these signals, which I do not view as conflicting, in any event emanate on a consistent wavelength: the belief that the existing flexibility and discretion on the part of federal trial judges, unfettered by arbitrary specifications of minutes or hours, historically has been adequate to balance the need for both fairness and efficiency in the jury selection process, and that these goals can best be achieved by the trial judge in light of the circumstances of the particular case at hand.

Finally, in response to your request for a suggestion that would guarantee participation by counsel while at the same time avoiding the pitfalls of the California system and of arbitrary time limits, I would propose that you consider the following, after seeking input on this approach from the federal judiciary.

Some (but not all) federal judges prior to the commencement of jury selection actively elicit from counsel their views concerning possible areas of inquiry or specific questions to be directed by the judge to the prospective jurors.

The Federal Rules could be amended to provide (as set forth in California Senate Bill 2087, appended to my prepared statement before the Subcommittee):

"If a party or counsel desires a question to be asked during the examination, the counsel shall submit the question to the court. The court may, in its discretion, propound the question to the prospective jurors, if it determines that the question is reasonably designed to assist the party or counsel in the intelligent exercises of challenges for cause."

This proposal failed to pass the California Legislature. Admittedly it does not represent a very substantial change from the Federal Rules as they now read.

Another slightly different approach would be to require that the trial judge give consideration to questions or areas of inquiry reasonably proposed by counsel -- but again permitting the trial court to ask such questions, if he or she determines that they should be asked, rather than requiring that counsel themselves be permitted to ask the questions.

Senator **Heflin**. The American Trial Lawyers want to make a statement and put it into the record, so we will keep the record open for that.

Senator Grassley, I believe, has a statement that he wants to be entered into the record.

[The prepared statement of Senator Grassley follows:]

Prepared Statement of Hon. Charles E. Grassley, a U.S. Senator From the State of Iowa

I would like to thank Chairman Heflin for calling this hearing on legislation to alter the jury selection process in the Federal courts.

Fair and impartial juries are, of course, guaranteed by the sixth and seventh amendments. The two Federal Rules of Procedure at issue here today have been with us for many years. As far as I am aware, those rules have served us well. Perhaps we will hear differently today.

Nonetheless, the burden is on those who would change the law. In my view, the proponents must show that the Federal Procedures are more likely to produce biased juries, which are in turn less likely to fairly decide cases, than those selected in States that still allow attorney questioning of jury panels.

I have great regard for the chairman of the subcommittee. If the current Federal rules concern him, then they are a concern of mine. I look forward to today's testimony.

Senator **Heflin**. If anyone else wishes to place a statement in the record, they may also.

We appreciate your coming at this early hour. I think we have set a new record for a congressional hearing. Thank you.

Judge **George**. Thank you, Senator.

Judge **Hodges**. Thank you, sir.

[Whereupon, at 8:40 a.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL STATEMENTS

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
1050 31ST STREET, N.W., WASHINGTON, D.C. 20007-4499 (202) 965-3500

STATEMENT

of the

ASSOCIATION OF TRIAL LAWYERS OF AMERICA

before the

SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

on

VOIR DIRE IN FEDERAL CIVIL AND CRIMINAL PROCEEDINGS
(S. 953 and S. 954)

July 1987

Mr. Chairman, the Association of Trial Lawyers of America (ATLA) deeply appreciates the courtesy you have extended in holding open the record of this hearing. We would have been pleased to appear on July 16, however that date coincided with our Annual Convention in San Francisco.

We are pleased to have this opportunity to express our views on S. 953 and S. 954, bills to permit counsel a minimum of thirty minutes to question prospective jurors during the voir dire process in federal civil and criminal proceedings. Mr. Chairman, ATLA strongly and enthusiastically supports both bills.

The Bylaws of ATLA state in part that: "The objectives and goals of The Association shall be to uphold and defend the principles of the Constitution of the United States; to advance the science of jurisprudence; .....and to uphold and improve the adversary system and trial by jury." S. 953 and S. 954 would advance all of those objectives.

It is perhaps fair to say that along with the ballot box, the jury box stands at the cornerstone of our democracy. Since the ratification of the Bill of Rights in 1791, the jury system in both civil and criminal proceedings has been rooted in our most fundamental law. The Chairman is correct when he states, as he did recently, that the single most fundamental aspect of the American system of justice is a fair and impartial jury. Indeed, the Constitution itself speaks explicitly not only of the right to trial by jury but expressly in Amendment VI and implicitly in Amendment VII of trial "by an impartial jury." The voir dire process is indispensable to the exercise and preservation of that right. Parties in both civil and criminal proceedings are entitled to a meaningful examination designed to ascertain the possible prejudice of prospective jurors.

Under the present Federal Rules (Rule 47 of the Civil Rules and Rule 24 of the Criminal Rules), the court may permit counsel "to conduct the examination of prospective jurors or may itself conduct the examination." However, in practice the court's discretion is rarely exercised. Judges seldom permit counsel to participate in voir dire. A study by the Federal Judicial Center showed that 77 percent of the 420 responding judges permitted no direct voir dire participation by attorneys in civil proceedings and 73 percent permitted none in criminal proceedings. Those numbers (as well as the hands-on experience of many of the 70,000 trial lawyers we represent) suggest strongly that amendments to the Rules are warranted. While it is true that presently the Rules are sufficiently flexible to allow direct oral examination by counsel, it is also true that unless the bench is required to do what in current practice it is simply permitted to do, counsel's role will remain inadequate.

Emphatically, that does not mean we believe that judges are indifferent to the biases of potential jurors or that judges do not take very seriously their responsibility to ensure as best they can the impanelling of an impartial jury. But it does mean that a valuable tool for ensuring impartially - a resource explicitly made available under the Rules - is being grossly under utilized. Quite simply, it is the lawyer who is most familiar with the facts and details of a particular case and hence often more competent to discover bias or predisposition than the judge.

Voir dire, to be meaningful, explores not only for obvious prejudice but also for more subtle mindsets and thought processes. Usually, counsel are better equipped to probe for these subtleties and are more likely to uncover them, particularly when a prospective juror's preconceived tendency is not evident on the surface. Not only is counsel more likely than the judge to ask the key follow-up question, but jurors apparently react and respond differently to questions put by lawyers than they do to identical questions posed by the judge. Often a juror is more candid in response to an attorney simply by virtue of the intimidating weight of the judge's authority. For whatever reason, there appears to be greater candor when lawyers are involved.

It is not an accident that Rule 47 and Rule 24, the Rules at issue here, provide for the exercise of peremptory challenges. That is not a mere afterthought; it is often vital to achieving the purpose of obtaining the most fair and impartial jury. Yet the value of the voir dire examination is reduced if it is not conducted by counsel for the parties. That in turn means the peremptory challenges are reduced in value. If trial counsel are denied an opportunity to conduct even a brief inquiry for the purpose of obtaining the very information on which to base a challenge, of how much value is that challenge? The Rules as presently drafted, therefore, appropriately envision a role for counsel. It is just that the discretion of the court to make use of that role is not being sufficiently exercised. Enactment of S. 953 and S. 954 would remedy that - and at little or no cost in terms of judicial time or money.

We are convinced that counsel participation in voir dire, under the terms and conditions of these bills, will neither compromise judicial control nor unduly extend the length of a trial. Indeed it may hardly lengthen trial time at all.

Admittedly, the time objection merits discussion. It is raised by opponents of these bills and it is addressed by the terms of the legislation itself. However, judges and legislators should keep in mind what has been stated by courts on more than one occasion: "Expedition should not be pursued at the cost of the quality of justice." That having been said, we believe the time concern expressed here is simply not a genuine problem. For one thing, under the bills there would be an absolute limit of thirty minutes per party and any extension of that time would be wholly at the court's discretion. In addition, according to testimony already provided by others to this subcommitte, a study by the Judicial Conference revealed that in civil cases voir dire with attorney participation averaged 44 minutes and without that participation, 36 minutes. In criminal trials, voir dire with participation by counsel averaged 52 minutes and 51 without. If those numbers are accurate, we don't believe courts are faced or would be faced with any real problem.

Another unwarranted concern is that somehow these bills would sacrifice judicial control, that the court's discretion over the conduct of voir dire would be removed. It would not. The bills not only impose a time limitation but in addition provide explicitly that "(t)he court shall have the authority to impose reasonable limitations with respect to the questions allowed during such voir dire examination."

It cannot be overlooked that the author and chief sponsor of these bills is a former state Supreme Court Chief Justice, certainly not an individual unfamiliar or unconcerned about issues regarding judicial control. Senator Heflin has stated, and we agree, that although the proposed legislation "gives counsel a more prominent role than they have previously experienced, they by no means will control the process. The judge will. He/she will still define the scope of the examination and control the content of questions, just as he/she controls the content of opening and closing statements and the phrasing of questions to witnesses during the actual trial. Judges will not be rendered helpless by unlimited voir dire. In the event of embarrassing questions, adversarial overtones, or otherwise improper proceedings, the judge retains the unfettered discretion he/she has always enjoyed in the courtroom. The firm hand of the judge will continue to guide the course of justice. The impartial, unbiased role of judges can only be enhanced by this legislation." Again, those are the words of a former distinguished Chief Justice.

When the objection is not phrased in terms of judicial control, it is framed as a concern about lawyer abuse: Attorneys will abuse voir dire; they will use it to try their case - voir dire will take on the appearance of a "mini-trial" as lawyers seek to advocate their case or otherwise influence prospective jurors Some attorneys, it is argued, will turn voir dire into a search for a partial rather than an impartial jury.

We believe these concerns are overstated. First, we are convinced that a lawyer who abuses voir dire hurts not helps his position with the jury. Secondly, perhaps more importantly, we do not attribute to members of the bar the irresponsibility implied by these objections. We think lawyers can and should be able to meet high standards. If these bills are enacted, ATLA will take a special interest in educating our members regarding the new rules and any responsibilities they impose. Abuse is a false concern. It won't happen or, at worst, can be controlled if it does.

Francis Hare, Jr., an attorney from Birmingham, Alabama, is one of the nation's foremost authorities on voir dire. We are pleased that he is also an active member of ATLA who recently served as national chair of our Education Department. Mr. Hare is the author of the voir dire chapter in the book Anatomy of a Personal Injury Lawsuit. Several years ago, he testified before this body on behalf of similar legislation. At that time, Mr. Hare addressed the abuse objection succinctly and we believe his testimony is worth repeating:

> The support for this objection or contention stems from the observation that the American system of jury trials is an adversarial proceeding and an adversary can and sometimes does become over zealous. The truth of this observation, however, affects every single phase of the trial from opening statement through direct and cross examination to final summation. No one has ever suggested that the other phases of our system of jury trials should be abolished because of the possibility of abusive behavoir by an over zealous advocate. No one has ever doubted either the authority or the efficacy of a federal judge's corrective admonitions of an over zealous trial lawyer.
>
> The final and telling answer to this contention is the simple observation that the trial lawyer who abuses voir dire is foolishly and unnecessarily hurting (not helping) his own personal credibility and his client's case - at a critical and sensitive time in the trial; viz., before the trial actually begins. The lawyer that exceeds the bounds of voir dire will, with predictable certainty, be personally reprimanded in the presence of the jury. The significance of this fact is

to merely underline the strength of the observatin that the enactment of (this legislation) is just not likely to actually result in the conduct of abusive voir dire.

Mr. Chairman, thank you again for extending us the opportunity to present our views.

STATEMENT IN REFERENCE TO LEGISLATION ALLOWING DIRECT COUNSEL INQUIRY OF JURYS.

By Judge Gerald L. Sbarboro
Chicago, Illinois

As a Trial Judge of over 11 years in the State of Illinois, the major portion of which assigned to both Civil and Criminal Jury Trials, may I respectfully suggest that the impartial jury is best achieved with some direct counsel participation in voir dire. So-called time-saving efficiency is a poor substitute for quality justice.

Perhaps the basic principle of our system is that although government may be necessary to monitor and operate the day-to-day affairs of the community, the sensitive decisions of justice are likely to be better handled by persons unconnected with the centers of power. In the United States, as in England where the jury originated, community participation has been chosen over decision making by experts.

That brings us to: Voir Dire

The sole purpose of the voir dire examination is to eliminate as many prejudiced or biased jurors as possible.

When a jury panel comes into the courtroom, sent there by the person in charge of the central jury room, after having been summoned on fairly short notice by an official-looking document from one or more county officials, its members are in a brand-new world. A large percentage of jurors has never even been in a courtroom before, or at least has never previously served on a jury. The trial judge and trial lawyer should keep in mind the jury panel's almost total ignorance of the jury system, the procedures to be followed in the trial, and the facts of the particular case. It is the task of the trial judge and the lawyers to educate and enlighten neophyte jurors on all of these matters. A voir dire featuring court balanced counsel-inquiry enhances this process.

The experience of this judge strongly indicates that it is not in the interests of justice for the trial court judges to strip the trial bar from personal contact with the jurors before the actual commencement of the trial. This is the stage upon which the trial law-cavorts, upon which he or she builds his or her foundation for his or her case. If my fellow judges will forgive me, judges cannot know what the trial lawyers know about their cases, what types of people they represent, what kind of evidence will be forthcoming and, therefore, we judges cannot do justice to the case by foreclosing the trial lawyers from meaningful voir dire.

Furthermore, it has been urged by trial tacticians and scholars that some direct inquiry by counsel is necessary to secure a frank and candid response--that too often a court will receive a detached response to its most discerning questions.

Their point highlights the position of Judge Donald P. Lay of the U. S. Court of Appeals, 8th Circuit, who in an article in the Judges Journal of July, 1974, observed:

> "Whatever the reason, it has been my experience that jurors are more frank and

> candid is responding to the lawyers' questions than to the judge."

The Illinois Supreme Court Rule 234 entitled Voir Dire Examination of Jurors provides as follows:

> "The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry, if it thinks they are appropriate, or may permit the parties to supplement the examination by such direct inquiry as the court deems proper. Questions shall not directly or indirectly concern matters of law or instructions."

Supreme Court Rule 431 dealing with voir Dire Examination in Criminal Cases provides as follows:

> "In criminal cases, the voir dire examination of jurors shall be conducted in accordance with Rule 234." (Illinois Rev. Stat. Chap. 110A, Sec. 234 and 431 (1975)).

It is to be noted that counsel have no absolute right to participate in voir dire. The commanded intent of the rule is clearly set out in three areas:

1. The court conducts voir dire.
2. The court may permit submission of questions by counsel (but is not required to).
3. The court may permit direct counsel-inquiry (but is not required to).

It is clear that this applies both to civil and criminal proceedings. It is equally clear that the court is granted broad discretionary power in conducting and controlling jury voir dire.

In final view, the judge has broad authority in permitting or refusing voir dire by counsel. I cannot, however, imagine any reasonable request for either direct inquiry or submitted requests for the court's inquiry to be summarily or arbitrarily denied. In this era of complex, multi-party litigation, some direct voir dire by counsel should be welcomed by the trial judge who cannot possibly be aware of all the nuances and subleties of an advocate's position; or the background of litigants. Consequently, while general voir dire should well be the judge's province, it is equally compelling for the lawyer to have limited special voir dire.

Let us now examine the arguments in favor of total court-conducted voir dire. They are: (1) Uniformity. (2) Speed-up of trial by eliminating argumentative and indoctrinating questions, and (3) Insuring a more impartial jury.

As for uniformity - it cannot and should not be applied to the adversary system of justice. So long as the role grants broad discretion to the judge, it will be exercised in varying degrees depending on his thought process and familiarity with all the issues.

At its Annual Chief Justice Earl Warren Conference on Advocacy in the United States, at Cambridge, Mass., in 1977, the Roscoe Pound-American Trial Lawyers Foundation examined the American Jury System, In its commentary on Voir Dire (Final Report) it stated, "Nearly everyone agreed that attorney conducted Voir Dire should be encouraged (with some dissent, of course) where many of the judges who conduct their own voir dire, explained they did so because too many lawyers who appear before them are unprepared or inexperienced."

I would suggest the unhappy possibility that these maladies may afflict a member of the bench as well as a member of the bar. Furthermore, in over eleven years presiding in jury trials, I have not found this to be so.

The report goes on to state:

> "those favoring court controlled voir dire, were shocked at an attorney's account of 'the fastest gavel in the West', who managed to select a jury in a very complicated civil case in twenty minutes."

Where is the virtue in uniformity?

This brings us to the matter of speeding up the trial. Can you imagine the traffic jam in a complex, multi-party case, when five, six, or seven lawyers keep rushing up to the Court with requests, oral or written, for additional questioning? This, I think, is not only demeaning to court and counsel, but would inevitably slow-up, not speed-up, the process.

More than two decades ago one of Illinois' leading trial lawyers and authors wrote:

> "... turning this task over to the trial judge saves a little time and helps to impede the attainment of true justice..." (Preparation and Trial - John Alan Appleman CORNIER PUBLICATIONS--P. 159 (1967)).

Mr. Donald Friesen, director of the Institute of Court Management at the University of Denver, has noted that:

> "If the whole argument for rules to limit voir dire is based upon congestion and delay in the courts, it is a specious argument. By reducing voir dire to 1/10 of what it now is, we would not increase the judge power of the United States by 1%."

The aforementionwed Judge Donald P. Lay of the U. S. District Court of Appeals has noted:

> "It is generally urged that the clever lawyer uses the voir dire as an opportunity to argue his case and ask improper argumentative questions. This theory is difficult to understand. It reflects more on the trial judge's inability to see that the propriety in the proceedings is followed in his court. The judge can easily control the kind of questions asked and the style in which the lawyer pursues his examination. He can do this in the same manner that he requires proper opening statements, direct and cross-examination, and closing arguments. To echo the old cliche, 'we should not throw the baby out just because the crib breaks down.' (The Judges' Journal, Vol. 13, No. 3, July, 1974)".

Finally, as to assuring a more impartial jury -- there is no absolutely no evidence to support that conclusion.

As Professor Wigmore observed:

> (Attorney-conducted voir dire) is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for layman, the scientist, or the foreign jurist to appreciate this, its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. (5 J. Wigmore EVIDENCE Sec. 1367 (1940)).

An interesting fact: Most of the commentators, teachers and judges who advocate total court-conducted voir dire, rarely labored in the pit, and have little or no experience as a trial advocate.

There are circumstances when the lofty deals of the planning room must give way to the realities of the courtroom. Lawyer participation in voir dire, I believe, is one of those circumstances. NORMAN,

(llinois Bar Journal Nov., 1978).

I do not intend by these comments to extend carte blanche to all lawyers in voir dire; so if assigned to trial in my court, they do not expect it. They may expect, however, a reasonable opportunity to inquire on voir dire, and this, of course, forecloses an unreasonable intrusion on propriety.

This, it seems to me, strikes a fair balance in testing the atmosphere; an important ingredient of the adversary system. Truthful responses are vital if a fair jury is to be selected; and the opportunity must be fully made available to a lay group of strangers.

> Thomas Paine put it right when he wrote:
> "But such is the irresistible nature of
> truth that all it asks, and all it wants,
> is the liberty of appearing."

CORRESPONDENCE

The James A. Walsh Courthouse

Richard M. Bilby
Chief Judge
United States District Court
District of Arizona

55 E. Broadway
Tucson, Arizona
85701-1790

July 16, 1987

Honorable Dennis DeConcini
United States Senator
328 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator DeConcini:

Mr. Evans of your staff has been kind enough to serve me with a copy of Senate Bills 953 and 954. I would like to reiterate the opposition of the Arizona District Judges to these Bills. By way of background, I am enclosing copies of my letter and Judge Hardy's letter of January 9, 1984, together with a memo to me from Judge Browning.

The Judges of Arizona have discussed voir dire on several occasions and employed an outside expert to assist us in refining our voir dire. This included a day-long meeting with video tapes of the voir dire by four different judges and comments thereon by the outside expert.

We feel confident that the Judges of this District handle voir dire in a competent and fair manner and the juries selected as a result thereof are a true cross-section of the community.

In summary, I urge you to vote against these Bills on the grounds that they will create more problems then they will solve and will not result in fair juries. If Senator Heflin's subcommittee would be interested, they are certainly invited to come to Arizona at any time and observe one of my voir dires.

Thank you for this opportunity to make our views known and to acquaint you with what we have done to assure a fair and adequate voir dire in the federal court.

Best regards,

Richard M. Bilby

Richard M. Bilby
Chief Judge

RMB/mga
Enclosures

United States District Court
DISTRICT OF ARIZONA
UNITED STATES COURTHOUSE
PHOENIX, ARIZONA 85025

CHARLES L. HARDY
Judge

January 9, 1984

The Honorable Dennis DeConcini
United States Senator
3230 Dirksen Bldg.
Washington, DC 20510

Re: Senate Bill 386

Dear Senator DeConcini:

I thank you for sending to me a copy of your letter of January 4th to Judge Muecke, requesting that members of the Court of this District submit any recommendations they may have regarding Senate Bill 386, which would amend Rule 24(a) of the Federal Rules of Criminal Procedure to require the District Court to permit "the defendant or his attorney, and the attorney for the Government to conduct the oral examination of prospective jurors." I am unalterably opposed to the bill for a number of reasons.

First, most lawyers, including many who are pretty good trial lawyers, do not know how to examine prospective jurors. Too often they ask questions that are utterly meaningless to the average juror.

When I was first a Superior Court Judge in 1967, I permitted lawyers to conduct some of the examination of prospective jurors. I quickly learned that much time was wasted because of their ineptitude in framing questions. For example, a very common question went something like this: "Do you understand that in order for the defendant to be found guilty, you must be convinced beyond a reasonable doubt--not a mere possible doubt but a reasonable doubt--before you can find him guilty? Do you understand that?" Of course the prospective jurors did not understand that. Most of them had never been in a courtroom before and had never heard the term "reasonable doubt."

Second, the amendment opens the door for what I consider to be an abuse of the jury selection process. Many trial lawyers contend that cases are won or lost during the examination of prospective jurors. One frequently reads articles in the various trial lawyer association magazines on the importance of the examination of prospective jurors and the opportunity it affords the lawyer to condition the juror to return a favorable verdict. In my judgment, the only function of examination of prospective jurors is to obtain a jury of men and women who will fairly and impartially hear the evidence, deliberate and return a verdict. The bill provides that the parties "may each request, and shall be granted not less than thirty minutes for such examination." The thirty minutes may not give a lawyer much time to condition a jury, but I feel that it is a case of getting the camel's nose into the tent.

Furthermore, I would anticipate that attempts will be made to amend the bill to require a longer minimum time. I don't believe that any lawyer seeking a right to examine prospective jurors would be satisfied with only thirty minutes.

Third, after requiring the Court to permit both sides to conduct oral examination of prospective jurors, the bill provides "and [the Court] may, in addition to such examination conduct its own examination." The structure of the sentence seems to require that any examination by the Court would have to be conducted after the parties had examined the prospective jurors. This is completely contrary to the general practice.

It has been my experience and observation that even where the parties are permitted to conduct extensive examination of prospective jurors, the trial judge initiates the examination. He explains to the prospective jurors the nature of the charge or charges against the defendant. He introduces the prosecuting attorney, the defendant and the defense attorney to the prospective jurors. If witnesses are in the courtroom he also has them identified to the jurors. He inquires whether any prospective juror has knowledge of the case, has had previous jury experience, has been involved in any way in a similar case, and whether the juror has any preconceived notion about the case. Ideally, the Judge's preliminary examination should afford a springboard for further questioning by both sides, if that is to be permitted.

Fourth, the amendment provides criminal defendants with one more ground for appeal by stating that "The court may impose such reasonable limitations as it deems proper with respect to the examination of prospective jurors...." If a court imposes any limitation, it can always be argued that it was unreasonable.

For these reasons I urge you to oppose Senate Bill 386.

Yours very truly,

Charles L. Hardy

CLH/js

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
55 E. BROADWAY
TUCSON, ARIZONA 85701

RICHARD M. BILBY
U.S. District Judge

January 9, 1984

The Honorable Dennis DeConcini
United States Senator
4104 Dirksen Office Building
Washington, D.C. 20510

Dear Dennis:

When first appointed, I would have favored S.386, however, four years of experience has changed my mind.

The true purpose of voir dire is to weed out persons with prejudices, preconceived ideas and other problems which would make it difficult for them to be fair and impartial jurors. Trial lawyers, while interested in these matters, are much more concerned with selling their case early and in obtaining six or twelve (as the case may be) jurors who they feel will favor their side.

If the federal district judges do their job properly, voir dire is better left with the court. All we are interested in is getting six or twelve good people to try the case. In talking with Judges Walsh, Richey and Marquez plus numerous attorneys in Tucson, I do not find any substantial support for this bill. I suggest you contact the lawyer delegates to the Ninth Circuit Judicial Conference from this area for their feelings. They are:

Howard Kashman
Richard McAnally
Richard Davis
David Bury

I have not discussed the matter with them and I am sure they will be candid in their response.

Thank you for seeking our advice on this important matter.

Best regards,

Richard

Richard M. Bilby

RMB:dca
cc: Chief Judge Muecke
All Arizona Judges
Lawyer Delegates

UNITED STATES GOVERNMENT
# memorandum

DATE: July 15, 1987

REPLY TO ATTN OF: William D. Browning WDB

SUBJECT: S 953 and S 954 (Voir Dire of prospective jurors)

TO: Chief Judge Bilby

Dear Richard:

It is my feeling that both of these bills are ill-advised and should not be passed. There is no demonstrated need for an amendment to the rules of procedure and there is no reason why there should be a statutorily mandated minimum examination time.

It is the duty of the trial judge, consulting with the parties, to inquire of the jury on all matters touching upon their qualifications and their fairness and objectivity in approaching the case. The trial judge presently has the discretion to allow the parties to examine the jurors, if he or she wishes or feels it advisable. There exists ample review by the appellate courts of the exercise of the judges discretion in qualifying the jury or denying or allowing examination by counsel.

S 953 and 954, as written, would merely create another administrative and judicial time-consuming layer to the trial process. The judge would be required to review the questions which he or she ultimately would allow and to "sanitize" those questions so as to protect the integrity of the jury qualification process.

Like you, I tried a great many cases in both state and federal courts and have conducted countless voir dire examinations of juries. Any trial lawyer of any experience will readily confirm that the opportunity for voir dire of the jury is viewed as the first opportunity by lawyers to persuade the jury of the righteousness of their client's cause. Indeed, all the text writers in the field urge the neophyte lawyer to master the voir dire process so that the jury is preconditioned to the client's cause. That is, of course, the function of lawyers in the adversary system, but it is a serious fallacy to assume that giving the parties the opportunity to voir dire in all cases will result in obtaining more information. The parties want the opportunity to voir dire not for information, but to use an opportunity for suasion on the jury.

I think that the time which will be consumed by judges reviewing questions the lawyers intend to ask and by dealing with objections from opposing counsel is unwarranted. There is no question that the court cannot ask in order to have informed counsel involved in the selection process, but to

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allow counsel to exercise their communicative skills in phrasing questions is an abuse of the jury selection process, in my opinion.

Consideration should also be given to the multiparty case in which, if these rule amendments are passed as written, hours and days could be consumed in the minimum voir dire process afforded to counsel. It would almost warrant an ineffective assistance of counsel charge if an attorney were afforded an opportunity to communicate with the jury, in the form of questioning them on their qualifications, and did not utilitize virtually the entire minimum time allotted.

I have on several occasions allowed counsel to conduct limited voir dire of the jury. I do not believe that such is in all cases undesirable. I do believe that it should be entrusted to the discretion of the trial judge in the individual case.

I assume you will be communicating further with Senator DeConcini and the Judiciary Committee and would appreciate your relaying my comments to them.

xc: Judge Marquez

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August 4, 1987

The Honorable Howell Heflin
Chairman, Subcommittee on Courts
  and Administrative Practice
Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator Heflin:

I am writing to follow up on Attorney Marvin Miller's testimony on behalf of NACDL before your subcommittee on July 16 regarding your attorney voir dire legislation.

The witnesses for both the Justice Department and the Judicial Conference articulated the same theme behind their opposition to the bills: "If it ain't broke, don't fix it." Such glib dismissals completely miss the point of the legislation. The goal is to weed out bias which, in the absence of attorney voir dire, is less likely to be exposed, to be seen, or to be documented. The Department and the Conference simply can't see that the process is "broke," because there is no mechanism, other than attorney voir dire, for improving the system's ability to identify and remove biased jurors. Moreover, there _is_ empirical evidence that current procedures are flawed, _i.e.,_ that judge-conducted voir dire is less effective than attorney-conducted voir dire in discovering bias--and I refer you to the Second Circuit Judicial Conference report cited in Mr. Miller's testimony, finding that attorney-conducted voir dire leads to a statistically greater number of challenges for cause. And surely, there can be no disputing that a system which permits the empaneling of jurors who are so biased that they should be removed for cause is a most fundamentally flawed system--a system which is "broke" at its very core, and in need of fixing.

Those witnesses also pointed to the time-consuming nature of attorney voir dire in states such as California. But your bills completely neutralize those arguments. In California, there is no statutory time limit on the period for attorney voir dire; the statute simply requires the judge to permit "reasonable" examination of prospective jurors by counsel, and, as Judge George pointed out in his testimony on the 16th, the California Court of Appeal has held that the notion of "reasonableness" is not susceptible to the fixing of an "arbitrary time limit," such as 30 minutes. Thus, in California, a 30-minute limitation is prohibited because it works to cut off an absolute right to "reasonable" voir dire guaranteed by the statute, whereas under S. 953 and S. 954, the statute itself would set the outer limit of the parties' absolute right to voir dire--*i.e.,* 30 minutes in single-defendant cases. And surely, there can be no doubt about the Congress' authority to prescribe the precise outer limits of any such procedural rights it chooses to establish. Moreover, time savings may arise in the area of appeals--in light of Judge Wiseman's compelling observation that fewer appeals result when the lawyer has had the opportunity to conduct his or her own voir dire, and cannot complain about the judge's conduct of questioning, or the failure to ask certain questions.

(On a related issue, I would suggest one area where both bills may benefit from some clarification. Both, in permitting additional time in multiple-defendant cases, provide that "the total time required to be allowed shall not exceed one hour per side." It is not clear whether this one-hour "total" applies only to the 10-minute add-ons in multiple-defendant cases, or whether it includes the initial 30-minute block as well. In your opening statement on the 16th, you suggested the former, stating that the bills would guarantee "a minimum participation time of 30 minutes, and a maximum of one *additional* hour in multi-defendant cases" (emphasis added). This ambuguity could be removed, consistent with your stated intent, by striking out, in the last sentence of each bill, "time required to be allowed" and inserting instead "additional time required to be allowed for such additional defendants".)

Finally, we would suggest that, if the opponents' stated concerns about the time burden and the possibility of abuse appear to present a major obstacle to enactment of the legislation (and we strongly agree with you that such problems have not been shown to be likely to arise), the Congress might wish to proceed with the bills in such a way as to test the merits of such concerns before the amendments made by the bills take final effect. This could be accomplished, for example, by providing for a limited pilot program, followed by a study and report on the experience in those jurisdictions included within the pilot program in comparison with jurisdictions operating under the pre-existing Rules, with a period for congressional review of the report, after which time the amendments would take final effect in all jurisdictions unless disapproved, modified or delayed further by the Congress. The pilot program could last for a year or two, and be conducted in a representative sampling of perhaps a dozen federal jurisdictions, to encompass all possible variations in size and complexity of cases, regional or geographical idiosyncracies, and rural/urban practice distinctions. The study and report should be conducted by an entity entirely independent from the Judicial Conference, the Justice Department, or any arm of the Executive Branch; it could, for example, be required to be conducted by the General Accounting Office, either by themselves or, if it is determined that they are unable to do it, by contract with any of the many qualified organizations devoted to criminal justice study and planning, such as the Rand Corporation or Abt Associates. The study should, at a minimum, be designed to collect information covering all cases processed in all sample jurisdictions from the very first day of the pilot program, both within the pilot program jurisdictions and the control jurisdictions (it may be best to have two different control groups: one where no attorney voir dire is conducted at all, and one where attorney voir dire is conducted at approximately the 25 percent frequency rate that it is currently being permitted in federal courts). It should examine the time consumed in voir dire, in relation to the approximate complexity of the case, its overall length, and the number of defendants, as well as figures relating to the excusal of jurors for cause, the judicial exercise of the legislation's discretion to impose "reasonable" limitations on the questions asked by counsel, the numbers of appeals arising out of voir dire issues, and interviews with judges, prosecutors and defense counsel regarding abuses or suggestions for improvement.

I would respectfully request that this letter be made a part of the official hearing record for the 16th. I hope these comments and suggestions are helpful to the Subcommittee in the consideration of these important bills. If NACDL can be of any further assistance, please do not hesitate to contact me.

With best regards,

Sincerely,

H Scott Wallace

H. Scott Wallace
Legislative Director